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Charles Lander Mayo
A TREATISE
ON

THE AMERICAN LAW
OF
ATTACHMENT
AND
GARNISHMENT

A COMPLETE STATEMENT OF THE
GENERAL PRINCIPLES APPLIED BY COURTS OF REVIEW
AND OF THE COMMON RULES GOVERNING THE
PRACTICE, UNDER ALL STATUTES

BY
ROSWELL SHINN

Member of the Chicago Bar
And Author of Shinn's Pleading and Practice

IN TWO VOLUMES
VOLUME II

INDIANAPOLIS AND KANSAS CITY
THE BOWEN-MERRILL COMPANY

1900

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Charles Allen
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GARNISHMENT.

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§ 465. Definition.—Garnishment is a proceeding by which plaintiff, in a suit to recover on a debt, may institute another

suit at law, in lieu of the defendant, against a debtor of the defendant, without the defendant's concurrence and it may be against his will, to subject the money or property in the hands of such debtor, to the satisfaction of the plaintiff's judgment in the first suit.¹

From the Norman origin of the word,² it is a "warning" given by the plaintiff in a suit to a third person who is a debtor of the defendant, or who has property of the defendant in his possession, that he must not pay the money to the defendant or deliver the property to him before the termination of the suit, and commanding him to hold the money or property subject to the order of the court when judgment is rendered.

It is an attachment growing out of the London custom,³ but is distinct from attachment by seizure in that it is a process of law whereby a defendant's effects, which can not be seized and taken into custody, may still be rendered liable to the payment of his debts. It is a process whereby debts due to the defendant may be subjected to the payment of his debts. It is a process and not a pleading and its purpose is served when it brings the debtor of the defendant (the "garnishee") before the court.

The person in whose hands the effects of the plaintiff's debtor is attached is called the "garnishee" because he is "garnished" or *warned* not to pay the money or deliver the property in his hands to the defendant, but to appear and answer the plaintiff's suit.⁴ This designation is very general, but in a few of the New England states the party so warned is called the "trustee" and the process by which he is warned is called "trustee process," and in Vermont and Connecticut he is sometimes called the "factor" and the process called "factorizing process." The terms "garnishee" and "garnishment" are, however, so nearly universal as to be understood in all cases and the terms

1. Definition formulated by the Boston Ins. Co., 28 Mo. App. 140. author. Compare, *Perkins v. Guy*, 2 Mont. 15; *Patton v. Smith*, 7 Iredell L. (N. C.) 438; *Gillis v. McKay*, 4 Dev. (N. C.) 172; *Mankin v. Chandler*, 2 Brock (U. S. Cir. Ct.) 125; *Ritter v.* Boston Ins. Co., 28 Mo. App. 140.
2. Kelham's Norman Dictionary, "Garnishment," etc.
3. *Ante*, § 1.
4. *Privilegia Londini*, 256; *Comm. Digest*, "Attachment E."

“trustee” and “trustee process” or “factor” and “factorizing process” will not be hereinafter used.

§ 466. **An anomalous proceeding.**—Garnishment is an anomalous proceeding, for while it seeks to obtain a judgment in behalf of the creditor against his debtor like an ordinary suit, it also aims to substitute the creditor in the place of his debtor in respect to any sum due to the latter from the person named in the suit as the garnishee.¹ It has a two-fold character. It is in the nature of a suit and at the same time possesses the nature of a final process.² It is in the nature of a proceeding *in rem* and, as in all proceedings *in rem*, the thing against which the proceedings are directed must be brought within the jurisdiction of the court by the proper service of a writ upon a proper demand.³ It is a sequestration of the effects of the debtor in the hands of the garnishee. And any tribunal may make use of it to the same extent that it may employ its execution process. It secures the debt due from the garnishee to the debtor or the property of the debtor in the hands of the garnishee. It effects the appropriation of such debt or property to the extent that the garnishee, after the commencement of garnishment proceedings, is not subject to an action by his creditor unless both suits are within the same jurisdiction, and under a system of procedure which regulates both, so as to afford the garnishee complete protection against a double liability.⁴ It is based upon the principle that every species of property is liable for the payment of debts,⁵ and permits a person indebted in any manner to the principal defendant to be summoned and made responsible as a garnishee.⁶ It is a legal process which

1. Hicks v. Gleason, 20 Vt. 139.

2. Holman v. Fisher, 49 Miss. 472.

3. American Bank v. Rollins, 99 Mass. 313; Childs v. Digby, 24 Pa. St. 23; McDonald v. Moore, 65 Iowa 171; Desha v. Baker, 3 Ark. 509.

4. Cheairs v. Slaten, 3 Humph. (Tenn.) 101; American Bank v. Rollins, 99 Mass. 313.

But a garnishment process must

yield to a prior action in another state brought by the principal defendant against the garnishee. American Bank v. Rollins, 99 Mass. 313.

5. Hanna v. Bry, 5 La. Ann. 651.

6. Halbert v. Stinson, 6 Blackf. (Ind.) 398; Webster v. McDaniel, 2 Del. Chy. 297; Belcher v. Grubb, 4 Harr. 461.

attaches the debt of the garnishee and subjects it to the satisfaction of the debt of the defendant in the original suit.¹

§ 467. **Wherein garnishment differs from attachment.**—Garnishment has been said to be a species of seizure by notice,² but it differs from an ordinary attachment by seizure in two important particulars:

(1) The validity of garnishment is not dependent upon the officer's taking possession, and (2) it creates no lien in favor of the plaintiff upon the defendant's property capable of manual delivery.³ But it does hold the garnishee to a personal liability.⁴ And gives to the attaching creditor a lien on the debt so far as to restrain the garnishee from paying it over to the original debtor, but no further.⁵ The attachment of the debt in the hands of the garnishee fixes it there in favor of the attaching creditor. A lien is created upon the indebtedness of the garnishee to the defendant and no subsequent arrangement or voluntary cancellation of the indebtedness between the garnishee and the defendant can destroy the lien, or affect the rights of the attaching creditor. This lien, which is also binding upon the defendant, will be recognized by the courts of other states.⁶ A debt due from another is as much "property," and as effectually attached by summoning, as a garnishee, the person owing it, as is any visible species of property which might have been seized under a writ of attachment.⁷

1. *Williams v. Gage*, 49 Miss. 777.

2. *Beamer v. Winter*, 41 Kan. 596.

3. *McGarry v. Lewis Coal Co.*, 93 Mo. 237; *Johnson v. Gorham*, 6 Cal. 195; *Dennistoun v. N. Y. C. & S. Co.*, 6 La. Ann. 782; *Gregg v. Savage*, 51 Ill. App. 281; *Parker v. Farr*, (Pa.) 2 *Browne* (Pa.) 331; *McConnell v. Denham*, 72 Iowa 494; *Mooar v. Walker*, 46 Iowa 164.

4. *Gregg v. Savage*, 51 Ill. App. 281; *Mooar v. Walker*, 46 Iowa 164.

5. *Parker v. Farr*, 2 *Browne* (Pa.) 331; *McConnell v. Denham*, 72 Iowa 494.

6. *Embree v. Hanna*, 5 Johns. (N. Y.) 101; *Martin v. Foreman*, 18 Ark. 249.

7. *Stahl v. Webster*, 11 Ill. 511. Same principle in *Erskine v. Staley*, 12 Leigh. (Va.) 406.

In South Carolina where the garnishee is not owing to the debtor, but has property in his hands belonging to such debtor, the process of garnishment gives a lien on the specific article of property in the garnishee's hands; but when a debt is due from the garnishee to the debtor no lien attaches to [the property of the gar-

Nevertheless, the property in the hands of the garnishee is, by the service of the writ of garnishment, placed in the custody of the law in so far that the sheriff himself can not thereafter take the property from the garnishee without a further order of court.¹

Garnishment is a further reaching proceeding than attachment, inasmuch as attachment will only subject property which is susceptible of being seized on execution,² while garnishment is a process by means of which a plaintiff may reach the property of a defendant inaccessible to an ordinary execution, and it will create a lien upon the debt garnished equal to that created by an execution on the property levied upon.³ In fact garnishment is designed to reach "goods, effects and credits intrusted and deposited in the hands of others which can not be attached by ordinary process."⁴ And by the earlier law specific property which might be attached by seizure could not be subjected in the hands of the garnishee by garnishment.⁵ But goods and chattels may be so placed in the hands of another as to be physically within the reach of an officer to attach, and yet there may be difficulties in the way of attaching them which a creditor may fairly wish to avoid, and in such cases the process of garnishment will be effectual to hold the effects of the debtor in the hands of the garnishee to answer the plaintiff's demand and perfect it by judgment.⁶

§ 468. Same—Land not generally subject to garnishment.

—As a general rule lands held by a third person are not subject until judgment against him. The service of the writ of garnishment simply makes the garnishee the debtor of the attaching creditor. *Parker v. Parker*, 2 Hill (S. C.) Ch. 35.

1. *Platt v. Brown*, 16 Pick. (Mass.) 553; *Scholefield v. Bradlee*, 8 Martin (La.) 495; *Dennistoun v. N. Y. C. & S. Co.*, 6 La. Ann. 782.

2. *Ante*, § 28.

3. *Watkins v. Cason*, 46 Ga. 444.

4. *Sharp v. Clark*, 2 Mass. 91.

5. *Allen v. Megguire*, 15 Mass. 490; *Hall v. Filter Mfg. Co.*, 10 Phila. 370.

6. *Burlingame v. Bell*, 16 Mass. 318; *Clark v. Brown*, 14 Mass. 271.

When goods can not be returned in the same plight (as hides in a vat) they can not be seized on attachment—*ante*, § 28; *Bond v. Ward*, 7 Mass. 139; *Leavitt v. Holbrook*, 5 Vt. 405—but they may nevertheless be attached by process of garnishment. *Clark v. Brown*, 14 Mass. 271.

ject to attachment, in the hands of a third person, by garnishment process; but, nevertheless, they may be so included when within the construction of the controlling statute. When the statute provides that goods, money, chattels, effects, rights or credits may be subjected by garnishment in the hands of a third person, a garnishment process thereunder will not subject real estate to the payment of the owner's debt.¹ It is said in Massachusetts that while land held by a third person may not in general be attached by process of garnishment,² yet there are many cases where the person having the legal title to real estate may be made answerable for the rents and profits or for the proceeds of the estate if sold by him in virtue of any written agreement, or declaration of trust. And where, although the garnishee is not compelled to make such disclosure, yet if he does disclose the fact that proceeds are in his hands he will be chargeable, and that such interrogatories may be propounded to him as may tend to show that he holds the estate in that manner or that he has received any rents and profits or proceeds of the sale of such real estate so held, the garnishee will then be obliged to answer, for his answers will not affect his legal title.³

§ 469. **When garnishment a suit.**—While garnishment can not be classed as a suit in the sense that ordinary actions are suits, yet it is a suit in that it must have a plaintiff and defendant who have their day in court.⁴ It may be stated, as a

1. *Moor v. Towle*, 38 Me. 133; (Mass.) 22; *Sanford v. Bliss*, 12 Pick. (Mass.) 116; *Gore v. Clisby*, 8 Pick. (Mass.) 555; *Lupton v. Cutter*, 8 Pick. (Mass.) 298; *Webb v. Peele*, 7 Pick. (Mass.) 247; *Ripley v. Severance*, 6 Pick. (Mass.) 474.

Machinery in a blacksmith shop, annexed to the building merely to make it firm, was held to be personal property and not a fixture, and, therefore, was subject to attachment by garnishment process. *Bartlett v. Wood*, 32 Vt. 372.

2. *Bissell v. Strong*, 9 Pick. (Mass.) 562; *Guild v. Holbrook*, 11 Pick. (Mass.) 101; *Tucker v. Clisby*, 12 Pick.

3. *Russell v. Lewis*, 15 Mass. 127.

In Wisconsin the statute authorizes a creditor to garnish any person having "real or personal" property belonging to such creditor's debtor. *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, 43 N. W. Rep. 153.

4. *Thorn v. Woodruff*, 5 Ark. 55.

rule, that in states where garnishment is not issued until after the creditor obtains judgment against his debtor, then the proceeding by garnishment against a person indebted to the judgment debtor is a new suit to which the creditor is plaintiff and the garnishee, the defendant, brought into court by the process. It is governed by the general rules applicable to other suits, and to this suit a judgment debtor is a stranger.¹ But where process of garnishment is issued after the commencement of a suit by other process, and before judgment therein, it is auxiliary to the original suit, possessing the properties of an ancillary attachment, and it must stand or fall with the writ in the original suit.²

In Maine and New Hampshire it is regarded as an equitable action, the object of which is to reach the property of the debtor in the hands of third persons, and in it the ownership of property must be determined; for, unless it is shown to belong to the debtor it can never be appropriated to satisfy the demands of the plaintiff.³ In Arkansas it is considered to be not an execution but a suit which is partly legal and partly equitable.⁴ And in North Carolina it is said to be substantially an action at law by the principal defendant, and, therefore, that the plaintiff can not recover against the garnishee in a case in which the principal defendant could not have recovered the same debt.⁵

1. *Edmondson v. De Kalb County*, 51 Ala. 103; *Hewitt v. Follett*, 51 Wis. 264; *Malley v. Altman*, 14 Wis. 22; *Daniels v. Clark*, 38 Iowa 556; *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. Rep. 252; *Delacroix v. Hart*, 24 La. Ann. 141; *Perkins v. Guy*, 2 Mont. 15.

Garnishment is in effect a suit by the defendant in the plaintiff's name against the garnishee without reference to the defendant's concurrence, and indeed may be in opposition to his will. *Perkins v. Guy*, 2 Mont. 15.

2. *Pounds v. Hamner*, 57 Ala. 342; *Barber v. Ferrill*, 57 Ala. 446; *Travis v. Tartt*, 8 Ala. 574; *Woodfolk v. Whitworth*, 5 Coldw. (Tenn.) 561.

In Missouri garnishment is considered, not to be a new suit, but an incidental or auxiliary remedy to the judgment and a means of obtaining satisfaction of the same by reaching the defendant's credits. *Tinsley v. Savage*, 50 Mo. 141.

3. *Kaley v. Abbot*, 14 N. H. 359; *Haven v. Wentworth*, 2 N. H. 93; *Boardman v. Cushing*, 12 N. H. 105; *Stedman v. Vickery*, 42 Me. 132; *Lealand v. Sabin*, 27 N. H. 74.

4. *Tunstall v. Worthington*, Hempst. (U. S.) 662.

5. *Patton v. Smith*, 7 Ired. L. (N. C.) 438; *Gillis v. McKay*, 4 Dev. (N. C.) 172.

§ 470. **Necessary Parties.**—When garnishment process is issued immediately after the commencement of the principal suit, or before the termination thereof, and as auxiliary thereto, then three parties are necessary to the garnishment proceedings. These are the plaintiff, the defendant and the garnishee. The plaintiff must prove his debt, the defendant must have due notice of the process against him, and the garnishee must be indebted to the defendant or be in actual possession of his property.¹ But where the garnishment process is sued out after judgment against the defendant in the principal suit, then such judgment debtor is a stranger to the garnishment proceedings, for it is a new suit in which the judgment creditor is the plaintiff and the garnishee the defendant.²

§471. **Position occupied by the garnishee**—(a) **Stakeholder or custodian.**—The garnishee is in most states considered to be “a defendant in the action.”³ He is a party to the action adverse to the plaintiff.⁴ And a judgment charging or discharging him has the same force and effect as other judgments: That is to say it is conclusive upon the parties as to the matter adjudicated.⁵

The garnishee, however, has no such active interest in the determination of the suit as a defendant has in ordinary suits. He has often been pronounced to be only a stakeholder or custodian of the funds or property in his hands, for the one or the other of the litigants as the case may be determined. He has no pecuniary interest in the matter, no costs to pay and none to save. His business is to let the law have its course between the litigants, and he is not permitted to do anything to change his position toward either. He is only bound to disclose the truth as to them. He is not permitted to interfere between the plaintiff and defendant, and the only question

1. *Mankin v. Chandler*, 2 Brock. C. v. *Altman*, 14 Wis. 22; *Boynton v. C. (U. S.)* 125. Fly, 12 Me. (3 Fairf.) 17.

2. *Edmondson v. De Kalb County*, 51 Ala. 103. 4. *Dennison v. Benner*, 36 Me. 227.

3. *Almy v. Platt*, 16 Wis. 169; *Malley* 234; *Demerritt v. Lyford*, 27 N. H. 541; *Mayberry v. Morris*, 62 Ala. 113.

5. *Lyford v. Demerritt*, 32 N. H.

to be determined as to him is whether he is indebted and can safely pay. He is at most a qualified defendant.¹ It is a matter of no concern to the garnishee which party shall succeed or to whom he shall pay the money due from him to the defendant.² It is his business to stand aloof from the contesting parties and to bind himself to the separate interest of neither.³ He is entirely indifferent as between them and can properly do nothing to aid either party in the litigation. He must act solely for his own protection.⁴ And he is restrained from paying over the money either to his individual creditor—the defendant—or to the attaching creditor, until the attachment is disposed of and then he must pay only according to the result of that proceeding.⁵

§ 472. (b) **Defends only himself.**—The liability of the garnishee is to be decided on his own answers and on the facts within his own knowledge. The reason for this is that he knows the relation between himself and his creditor.⁶ All he is required to do in the first instance is to answer generally as prescribed by the statute. He is not required to make any defense as between the plaintiff and defendant.⁷ Nor is he required to superintend the defense for the principal debtor. He is not answerable for such defects and irregularities in the proceedings as relate only to the mutual rights of the original parties to the suit, but he should know that the proceedings against himself are valid and such as he is legally compelled to obey; for, the proceeding being in its nature *ex parte* so far as the attachment debtor is concerned, the garnishee will otherwise have no evidence of any request either express or implied for payment on the part of his creditor—the defendant.⁸

1. *Lyman v. Orr*, 26 Vt. 119; *Marqueze v. Le Blanc*, 29 La. Ann. 194; *Hodges v. Graham*, 25 La. Ann. 365, 380; *Bean v. Miss. Union Bank*, 5 Rob. (La.) 333.

2. *Cook v. Whitney*, 3 Woods, (U. S.) 715.

3. *Citizens' Bank v. Payne*, 21 La. Ann. 380.

4. *Phipps v. Rieley*, 15 Ore. 494.

5. *Ege v. Koontz*, 3 Pa. St. 109.

6. *Folsom v. Haskell*, 11 Cush. (Mass.) 470.

7. *Moore v. Chicago, etc., R. R. Co.*, 43 Iowa 385.

8. *Harmon v. Birchard*, 8 Blackf. (Ind.) 418; *Schoppenhast v. Bollman*, 21 Ind. 280.

He is primarily taken to be an innocent person who is called into court as owing money to another, or as having property of another in his hands, and in either case without fault or blame. He is presumed to stand indifferent as to whom shall have the money or property and his answer is generally the only evidence of his indebtedness or liability. By many statutes an issue may be taken on his answer by the plaintiff, but if such issue be not taken, the answer remains the sole test of his indebtedness. His rights are to be carefully protected and he is to be charged only upon his contract relation with his creditor as it existed between them.¹

§ 473. (c) **Is not protected by principal defendant.**—It is no part of the duty of the defendant in the original suit to defend the garnishee. The garnishee must himself see that he is not adjudged to pay otherwise than according to law.² Furthermore, if the garnishment is groundless, the garnishee may recover against the plaintiff and his bondsmen for the actual damages caused by its issuance and if it is also vexatious or malicious exemplary damages may be recovered.³

§ 474. (d) **Chargeable only for what he owes or holds.**—The garnishee's liability is measured by the amount his answer shows that he is indebted to the defendant in the original suit when the same is due at the time of the service of the writ; or to become due thereafter absolutely, when the statute particularly specifies his liability therefor.⁴

The garnishee is also chargeable for articles of personal

1. *Walters v. Washington Ins. Co.*, 1 Iowa 404.

When the garnishee is notified to appear and show cause why execution should not issue against him on a judgment by default, he must make it appear *prima facie* that he has a meritorious defense. *Fifield v. Wood*, 9 Iowa 249.

When a statute authorizes the garnishee to appear and defend his principal, it treats the whole proceeding

as a commencement of the original suit and the garnishee as a general defendant. *Harris v. Phoenix Ins. Co.*, 35 Conn. 310. But such a provision is seldom found.

2. *Pounds v. Hamner*, 57 Ala. 342.

3. *Hays v. Anderson*, 57 Ala. 374.

4. *Gause v. Cone*, 73 Tex. 239; *Planters' Bank v. Andrews*, 8 Porter (Ala.) 404; *post*, §§ 621, 640, 685.

property in his possession which belong to the principal debtor, although the garnishee may have no claim or lien upon the property, and no right to the exclusive use of it, and no right to make use of it any longer than the principal debtor may choose to permit, and, in many cases, although the property may be, in all respects, liable to seizure upon the ordinary process of attachment.¹

It is a universal rule of law that the garnishee is to be carefully protected, and that he is not to be placed in a worse position than he was before the proceedings were begun. Therefore when he pays the judgment or complies with the order of court entered against him, such judgment is a complete protection against any subsequent claim made by his creditor—the principal defendant—for the amount so paid. Unless by his own negligence or carelessness, he will never be compelled to pay the debt twice. His liability to the plaintiff in garnishment can be no greater than it would be to his own creditor, if such creditor—the principal defendant—were enforcing the demand against him.²

§ 475. Nature of demand which must exist between debtor and garnishee—(a) Must be a cause of action at law.—It is a general rule, though not quite decisive, that no claim can be secured by garnishment against a debtor unless his creditor—the principal defendant in the suit—can maintain a common law action for the same if due or when it becomes due. In other words, there must be such a liability on the part of the garnishee as would enable the principal defendant to maintain an action, in his own name and for his own use, directly against

1. *Brown v. Davis*, 18 Vt. 211.

2. *Wigwall v. Union, etc., Co.*, 37 Iowa 129; *Burton v. District Township*, 11 Iowa 166; *Wilson v. Albright*, 2 Greene 125; *Smith v. Clarke*, 9 Iowa 241; *Whipple v. Robbins*, 97 Mass. 107; *Wetter v. Rucker*, 1 Brod. & B. (Eng.) 491; *Walters v. Washington Ins. Co.*, 1 Iowa 404.

A default judgment against a garnishee who fails to appear in the proceeding, is no bar to a subsequent action against him, on the debt for which he was garnished, by a person claiming to own or hold the same by assignment from the defendant prior to the garnishment. *McPhail v. Hyatt*, 29 Iowa 137.

the garnishee and to recover a judgment therein. If the garnishee have funds, property or credits in his hands belonging to the plaintiff's debtor—the defendant—for which the latter has a right to sue, then the garnishee may be held liable therefor when the plaintiff's demand is proven. This state of facts must be made affirmatively to appear.¹

This rule is, of course, modified by the law of exemptions, for the principal defendant may have a right of action against the person contemplated as garnishee, and yet a plaintiff in garnishment may not be able to enforce the same because of its being a demand for wages, or other demand, or property protected by the exemption laws.²

§ 476. (b) **Must be indebted or have personal property in possession susceptible of seizure on execution.**—The demand which must exist between the plaintiff's debtor and the garnishee must be (1) a legal indebtedness³ in a sum of money, or (2) the garnishee must, at the time, have actual possession of personal property of the debtor susceptible of being seized on execution. There must be a privity of contract expressed or implied and an interest between the garnishee and the defendant. These are the only general conditions which will

1. *Hassie v. God is With Us Congregation*, 35 Cal. 378; *Hallowell v. Leafgreen*, 3 Colo. App. 22, 32 Pac. Rep. 79; *Webster v. Steele*, 75 Ill. 544; *May v. Baker*, 15 Ill. 89; *Whitney v. Munroe*, 19 Me. 42; *Odend'hal v. Devlin*, 48 Md. 439; *White v. Jenkins*, 16 Mass. 62; *Jones v. Gorham*, 2 Mass. 375; *Farwell v. Circuit Judge*, (Farwell v. Chambers) 62 Mich. 316, 28 N. W. Rep. 859; *Edney v. Willis*, 23 Neb. 56; *Getchell v. Chase*, 37 N. H. 106; *Banfield v. Wiggin*, 58 N. H. 155; *Proctor v. Lane*, 62 N. H. 457; *Park v. Matthews*, 36 Pa. St. 28; *Carpenter v. Gay*, 12 R. I. 306; *Bassett v. Garthwaite*, 22 Tex. 230; *Hoyt v. Swift*, 13 Vt. 129; *Kettle v. Harvey*, 21 Vt. 301; *Hem-*

menway v. Pratt, 23 Vt. 332; *Lyman v. Wood*, 42 Vt. 113.

2. *Park v. Matthews*, 36 Pa. St. 28. See further as to exemptions, *post*, § —.

Money due from one partner to another as the share of the profits of the partnership can not be secured by garnishment, unless the affairs of the partnership have been settled and the balance admitted to be due; for until then no action at law can be sustained therefor. *Ryon v. Wynkoop*, 148 Pa. St. 188, 23 Atl. Rep. 1002.

3. A right to recover money on account of usury is not legal indebtedness and therefore garnishment will not lie in such cases. *Boardman v. Roe*, 13 Mass. 104.

support a garnishment except in cases of fraudulent disposition of property. When the garnishee is so indebted to the defendant in the principal action, or has credits or other personal property in his hands or under his control belonging to such defendant, the service of the writ upon him will make him liable therefor to the plaintiff, until the attachment is discharged or the judgment of the plaintiff in the attachment is satisfied, or unless he pays such debts, transfers such credits or other personal property to the sheriff.¹ When the debt is not contracted to be paid in money, but in property or "store accounts," a garnishment process will not reach such indebtedness.²

The fact that a legal indebtedness exists between the garnishee and the principal debtor is sufficient to sustain garnishment proceedings, although something further, as for instance a demand, may be requisite in order to give the principal debtor a right of action against him therefor.³

There must be an actual debt existing; therefore, although there be a contract, as for the manufacture of an article or the performance of a piece of work at a certain price, such sum of money is not subject to garnishment before the completion of

1. *Blair v. Rhodes*, 5 Ala. 648; *Smith v. Chapman*, 6 Porter, (Ala.) 365; *Randolph v. Little*, 62 Ala. 396; *Robinson v. Tevis*, 38 Cal. 611; *Hassie v. God Is With Us Congregation*, 35 Cal. 378; *Huot v. Ely*, 17 Fla. 775; *Skowhegan Bank v. Farrar*, 46 Me. 293; *Walker v. Cook*, 129 Mass. 577; *Field v. Crawford*, 6 Gray, (Mass.) 116; *Maine Ins. Co. v. Weeks*, 7 Mass. 438; *Webster v. Gage*, 2 Mass. 503, 505; *Clark v. Brown*, 14 Mass. 271; *White v. Jenkins*, 16 Mass. 62; *Bridgen v. Gill*, 16 Mass. 522; *Lupton v. Cutter*, 8 Pick. (Mass.) 298, 304; *Hooper v. Hills*, 9 Pick. (Mass.) 435, 440; *Mayhew v. Scott*, 10 Pick. (Mass.) 54; *Greenleaf v. Perrin*, 8 N. H. 273; *Arrington v. Screws*, 9 Ired. (N. C.) 42; *Mitchell v. Byrne*, 6 Rich. L. (S. C.) 171;
- Burrell v. Letson*, 1 Strobb. L. (S. C.) 239; *Clarke v. Farnum*, 7 R. I. 174.
- A few statutes include real property as well as personal property, but they are exceptions to the rule, and such instances will be known to the local practitioner and need not be mentioned here.
2. *M'Minn v. Hall*, 2 Overt. (Tenn.) 328; *Wells v. Banister*, 4 Mass. 514; *Weil v. Tyler*, 38 Mo. 545, 43 Mo. 581.
- As to a debt payable in services being susceptible to garnishment in New Hampshire under acts of 1715 and 1795, see *Louderman v. Wilson*, 2 Har. & J. (Md.) 379,
3. *Webster Wagon Co. v. Home Ins. Co.*, 27 W. Va. 314; *Corey v. Powers*, 18 Vt. 587. See, also, *Burt v. Hurlburt*, 16 Vt. 292.

the work, and if acceptance is a condition precedent to the payment of the money then the price can not be garnished before such acceptance is expressed; for until that time there is no legal indebtedness.¹ Likewise a consignment of goods to one who is made a garnishee will not render him liable until the same have arrived and been accepted.²

Respecting "goods and effects" in the hands of a third person contemplated as garnishee, the rule is this: A person in possession of chattels can not be chargeable as a garnishee for them, unless they are subject to execution or attachment, or unless a present right of action for them exists in favor of the principal debtor who is contemplated as defendant in the suit.³ One who has purchased goods on a conditional sale, and, after having received the goods into his possession, has failed to perform such condition, may be charged as garnishee in a suit against the vendor—the owner.⁴ And one who has contracted to sell personal property of another in his possession and the same is to be delivered at a future time, the sale being completed by the payment to him of the purchase money, he

1. *Edwards v. Roepke*, 74 Wis. 571; 43 N. W. Rep. 554; *Smith v. Davis*, 1 Wis. 447; *Wood v. Buxton*, 108 Mass. 102; *Otis v. Ford*, 54 Me. 104; *Ware v. Gowen*, 65 Me. 534.

An indebtedness upon a promise to do certain work for another to a certain amount is not a subject of garnishment until the promise is broken. *Wrigley v. Geyer*, 4 Mass. 102. Where there is a contract to pay a certain price when a certain piece of work is done, and the laborer abandons the work before completion, the promisor can not be held by garnishment. *Otis v. Ford*, 54 Me. 104.

A contract to deliver specific articles of personal property can not be converted into a contract for the payment of money so as to enable a party to resort to garnishment until there has been default on the part of the con-

tractor or promisor. *Smith v. Davis*, 1 Wis. 447.

2. *Patterson v. Perry*, 5 Bosw. (N. Y.) 518, 10 Abb. (N. Y.) Pr. 82.

3. *Haven v. Wentworth*, 2 N. H. 93.

Property held in trust.—As to charging any person, in Maine, as a garnishee for any interest which he may have "by virtue of a bond or contract in writing to a conveyance of real estate upon condition to be by him performed" as well after the condition has been performed as before, see *Whittier v. Vaughan*, 27 Me. 301; *Whitmore v. Woodward*, 28 Me. 392. Compare *Lambard v. Pike*, 33 Me. 141; *Houston v. Jordan*, 35 Me. 520. But the obligee's interest in such bond can not be garnished where the right has been forfeited with the non-performance of a condition precedent. *Brett v. Thompson*, 46 Me. 480.

4. *Emery v. Davis*, 17 Me. 252.

may be charged as garnishee in an action against the vendee before the goods are delivered to him or before the money is returned to him in case the owner reclaims the property. If the property be delivered to the vendee and the purchase price not yet delivered to the owner, he may be held as garnishee in an action against the owner.¹ The rule regarding contingencies will be further stated hereinafter.²

The indebtedness must exist or the personal property be within the state. It is a fundamental principle of the law of attachment that the property must be within the jurisdiction of the court; therefore unless the effects are within the state, or the debt is due to the principal defendant from the contemplated garnishee in the state, the debt or chattels can not be made susceptible to a proceeding in garnishment.³ This subject will receive further treatment subsequently when considering who may be made a garnishee.

§ 477. (c) Custodian of choses in action is not "indebted"—Neither are they chattels in possession.—One who is a mere custodian of choses in action and who has not received any money upon them is not in any sense indebted to the contemplated defendant, nor are written evidences of such choses in action (as for example notes) personal property in his possession in a sense that will render him liable therefore as garnishee in a suit against the defendant, in the absence of a special statute to that effect.⁴

1. Edson v. Trask, 22 Vt. 18.

2. Post, § 481.

3. Green v. Farmers', etc., Bank, 25 Conn. 452; Wells v. East Tenn. V. & G. R., 74 Ga. 548; American Bank v. Rollins, 99 Mass. 313; Todd v. Mo. Pac. Ry. Co., 33 Mo. App. 110; Wheat v. Platte City & Fort D. Ry. Co., 4 Kan. 370; Burlington & M. Ry. Co. v. Thompson, 31 Kan. 180. But, see Harvey v. Great Northern Ry. Co. 50 Minn. 405, 52 N. W. 905.

4. Gilmore v. Carnahan, 81½ Pa. St. 217; Raiguel v. McConnell, 25 Pa. St.

362; Clark v. Viles, 32 Me. 32; Stone v. Dean, 5 N. H. 502; Aldrich v. Brooks, 25 N. H. 241; Fuller v. Jewitt, 37 Vt. 473; Keyes v. Rines, 37 Vt. 263; Bates v. Forsyth, 69 Ga. 365; Maine F. & M. Ins. Co. v. Weeks, 7 Mass. 438; Dolby v. Tingley, 9 Neb. 412; Tingley v. Dolby, 13 Neb. 371; Van Amee v. Jackson, 35 Vt. 173; Fitch v. Waite, 5 Conn. 117; Moore v. Pillow, 3 Humph. (Tenn.) 448.

As to the liability of the maker of the note, see, post, § 562, et seq.

The assignee of choses in action, though such assignment may have been made orally, can not generally be made liable in garnishment, when he has notice thereafter of such assignment.¹

§ 478. (d) **A judgment is a debt.**—When a judgment has been entered in a competent court such judgment is a “debt” within the meaning of the attachment law rendering the judgment debtor liable as a garnishee in a suit by a third person against the judgment creditor, and while it may not be seized on direct attachment it may be levied upon and sold under execution or when attached by garnishee process.² But a garnishee proceeding founded on a void judgment is a nullity and money received thereon by the garnisher may be recovered.³ It was once thought that the judgment must have been entered in the court in which the garnishment proceeding is brought. But now a judgment debt may be the subject of garnishment, although such judgment was entered in another court or in another state.⁴

1. *Noyes v. Brown*, 33 Vt. 431; *Hutchins v. Watts*, 35 Vt. 360; *Gore v. Clisby*, 8 Pick. (Mass.) 555.

Further as to the liability of the assignee to be made a garnishee, see, *post*, § 534.

2. *Jones v. New York & Erie R. R. Co.*, 1 Grant. (Pa.) Cas. 457; *Fithian v. N. Y., etc., R. R. Co.*, 31 Pa. St. 114; *Knabb v. Drake*, 23 Pa. St. 489; *O'Brien v. Liddell*, 18 Miss. (10 Smed. & M.) 371; *Gray v. Henby*, 9 Miss. (1 Smed. & M.) 598; *Ochiltree v. Missouri*, Iowa, etc., Ry. Co., 49 Iowa 150; *Webster v. McDaniel*, 2 Del. Ch. 297; *Belcher v. Grubb*, 4 Harr. (Del.) 461; *Dubois v. Dubois*, 6 Cowen (N. Y.) 494; *Holtby v. Hodgson*, L. R. 24 Q. B. Div. 103. Compare *Shinn v. Zimmerman*, 23 N. J. L. (3 Zab.) 150; *Black v. Black*, 32 N. J. Eq. 74; *Hill v. Beach*, 12 N. J. Eq. 31.

And the fact that the judgment has not been entered or signed is said to

be immaterial. *Holtby v. Hodgson*, L. R. 24 Q. B. Div. 103.

A judgment for damages recovered against one of them selling property exempt from execution may be attached by process of garnishment. *Knabb v. Drake*, 23 Pa. St. 489.

Prima facie evidence.—The judgment itself is *prima facie* evidence of the garnishee's liability and if he has been discharged from it the burden is upon him to show that fact. *O'Brien v. Liddell*, 18 Miss. (10 Sm. & M.) 371.

3. *Haynes v. Gates*, 2 Head. (Tenn.) 598.

4. *Calhoun v. Whittle*, 56 Ala. 138; *Hitt v. Lacey*, 3 Ala. 104; *Skipper v. Foster*, 29 Ala. 330; *Faulkner v. Chandler*, 11 Ala. 725; *Jones v. New-York Erie R. R. Co.*, 1 Grant (Pa.) Cas. 457; *Fithian v. N. Y., etc., R. R. Co.*, 31 Pa. St. 114.

§ 479. (e) A debt is not changed in its nature because of suit pending thereon.—A claim on which a suit is pending and on which a judgment has not been entered was once said to have changed its nature from a debt that will support a process of garnishment, and that being *quasi in custodia legis*, it could not be made the subject of garnishment while a suit is pending thereon.¹ But now the weight of authority is that its nature is not changed, and that it is none the less a debt because of a suit having been begun to collect the same, and that the same may be made the subject of a proceeding in garnishment.² But in Rhode Island both suits must be pending in the same court.³

A suit pending on a mere claim for damages, unliquidated, will not support a proceeding in garnishment.⁴

§ 480. (f) Must be a debt due or to become due absolutely.—Some statutes require that the debt must be due and payable at the present time in order that it may be made the subject of a proceeding in garnishment, while others permit a debt which is to become due in the future, to be so made liable, but it is a universal requirement that it must be an absolute existing debt, even though the period of its payment may not yet have arrived.⁵

1. Gridley v. Harraden, 14 Mass. 497; Babington v. Babington, Cro. Eliz. 157; Humphrey v. Barns, Cro. Eliz. 691.

2. Jones v. New York, etc., R. R. Co., 1 Grant (Pa.) Cas. 457; McCarty v. Emlen, 2 Dall. 277; McCarty v. Emlen, 2 Yeates (Pa.) 190; Sweeny v. Allen, 1 Pa. St. 380; Lieber v. St. Louis, etc., Asso., 36 Mo. 382.

3. Smith v. Carroll, 17 R. I. 125, 21 Atl. Rep. 343.

The garnishee may discharge himself from liability in the proceedings in garnishment by paying the judgment or the debt on which the other suit is pending. Westbrooks v. Mc-

Dowell, Ga. Dec. Part I, 133.

4. Burrill v. Letson, 2 Speers L. (S. C.) 378; Burrell v. Letson, 1 Strobn. L. (S. C.) 239.

5. Maduel v. Mousseaux, 29 La. Ann. 228; Richardson v. Gurney, 9 La. 285; Peebles v. Meeds, 96 Pa. St. 150; Franklin Fire Ins. Co. v. West, 8 Watts. & S. (Pa.) 350; Claffin v. Iowa City, 12 Iowa 284; Webber v. Doran, 70 Me. 140; Lyford v. Holway, 27 Me. 296; Frothingham v. Haley, 3 Mass. 68; Wood v. Partridge, 11 Mass. 188; Clark v. Brown, 14 Mass. 271; Tuel v. Clisby, 12 Pick. (Mass.) 22, 25; Childress v. Dickins, 8 Yerg. (Tenn.)

§ 481. (g) **Must not be contingent or affected by existing liens.**—When the indebtedness is contingent upon the happening of some future event, so that it is uncertain whether the contemplated garnishee will or will not be indebted to the principal defendant, a garnishment process will not be competent to secure such contingent sum for the use of the plaintiff so long as the contingency lasts.¹

A debt which is not really contingent, but only apparently so, may be the subject of garnishment.² The contingency which will prevent the property or debt from being attached must be such a contingency as affects the property or debt itself, and not simply one which affects the liability of the garnishee to have the effects or credits taken from him in a particular

113; Sand-Blast File-Sharpening Co. v. Parsons, 54 Conn. 310, 7 Atl. Rep. 716, Coburn v. Hartford, 38 Conn. 290; Hearne v. Keath, 63 Mo. 84; Walke v. McGehee, 11 Ala. 273; Ordway v. Remington, 12 R. I. 319; De Graff v. Thompson, 24 Minn. 452.

1. Maduel v. Mousseaux, 29 La. Ann. 228; Rundlet v. Jordan, 3 Me. 47; Sayward v. Drew, 6 Me. 263; Dwinel v. Stone, 30 Me. 384; Williams v. Androscoggin, etc., R. R. Co., 36 Me. 201; Mace v. Heald, 36 Me. 136—(but compare Cutter v. Perkins, 47 Me. 557); Jordan v. Jordan, 75 Me. 100; Meacham v. McCorbitt, 2 Mete. (Mass.) 352; Wells v. Banister, 4 Mass. 514; Godfrey v. Macomber, 128 Mass. 188; Fellows v. Smith 131 Mass. 363; Wood v. Partridge, 11 Mass. 488, 493; Webber v. Bolte, 51 Mich. 113; Reinhart v. Hardesty, 17 Nev. 141; Haven v. Wentworth, 2 N. H. 93; Bates v. New Orleans, etc., R. R. Co., 4 Abb. Pr. 72; 13 How. (N.Y.) Pr. 516; Selheimer v. Elder, 98 Pa. St. 154; Vollmer v. Chicago & N. W. Ry. Co., 56 N. W. Rep. 919, 86 Wis. 305.

An insurance company, which has a right to pay the loss or rebuild the structure, can not be held as a gar-

nishee because of the contingency. Godfrey v. Macomber, 128 Mass. 188. Hurst v. Home Protection Fire Ins. Co., 81 Ala. 174.

And a covenant to pay rent at a future time is so dependent upon a contingency as not to be made the subject of a garnishment process. Wood v. Partridge, 11 Mass. 488, 493.

Claims for money, which will not become due until the performance of a contract at some future time, may not be reached by process of garnishment because of the uncertainty of their becoming due. Webber v. Bolte, 51 Mich. 113.

But in states where the garnishment process will secure sums to become due, an indebtedness which accrues from labor performed after the service of the writ on the garnishee may be the subject of garnishment. Such a claim is not contingent within the meaning of the law where it does not appear that the labor was performed upon an entire contract which is not completed. Newell v. Ferris, 16 Vt. 135.

2. Webster Wagon Co. v. Home Ins. Co. 27 W. Va. 314.

manner.¹ It must be such a contingency as may preclude the principal from any right to call the garnishee to account.²

It is said that in order that one may be made liable as a garnishee, the debt he owes the defendant must be of such a character that, upon being served with process, he might pay the amount without being compelled to await the determination of other proceedings to adjust the accounts between him and the principal debtor.³

Likewise a debt can not be secured by garnishment process when affected by prior liens, or prior encumbrances, or conditions of contract while such liens or conditions still in fact exist.⁴

§ 482. (h) Must be a demand that will support an action of "debt" or "*indebitatus assumpsit*."—The nature of the demand which must exist between the debtor and the garnishee is frequently, and with substantial truth, stated to be, that in order to enable a creditor to reach in this summary way of attachment, a demand owing from a third person to his debtor, the demand of his debtor against the contemplated garnishee must be of such a nature that such debtor could maintain an action of "debt" or *indebitatus assumpsit* for the recovery of the demand sought to be subjected.⁵

1. Frothingham *v.* Haley, 3 Mass. 111; McDermott *v.* Donegan, 44 Mo. 111; Willard *v.* Sheafe, 4 Mass. 235; Mo. 85.

Wood *v.* Partridge, 11 Mass. 488; 4. Scales *v.* Southern Hotel Co., 37 Tucker *v.* Clisby, 12 Pick. (Mass.) 22; Mo. 520; Heege *v.* Fruin, 18 Mo. App. Thorndike *v.* De Wolf, 6 Pick. (Mass.) 139; Weil *v.* Tyler, 38 Mo. 545, 43 Mo. 581; Hitchcock *v.* Lancto, 127 Mass. 514.

120; Guild *v.* Holbrook, 11 Pick. 581; Cook *v.* Walthall, 20 Ala. 334; (Mass.) 101; Clarke *v.* Brown, 14 5. Walke *v.* McGehee, 11 Ala. 273; Lundie *v.* Bradford, 26 Ala. 512; Nesbitt Mass. 271; Downer *v.* Curtis, 25 Vt. 650; Ware, 30 Ala. 68; Powell *v.* Sammons, 31 Ala. 552; Godden *v.* Pierson, 42 Ala. 370; Butterfield *v.* Hartshorn, 7 N. H. 345; Williams *v.* Gage, 49

650. 2. Dvinel *v.* Stone, 30 Me. 384. Miss. 777; Hoyt *v.* Swift, 13 Vt. 129; May *v.* Baker, 15 Ill. 89; Harrell *v.* Whitman, 19 Ala. 138; Hassie *v.* God, etc., Congregation, 35 Cal. 378; Hinckley *v.* Williams, 1 Cush. (Mass.) 490;

3. Sheedy *v.* Second Nat. Bank, 62 Mo. 17; Lackland *v.* Garesche, 56 Mo. 267.

Defenses of garnishee.—Whatever defense the garnishee could urge against the principal debtor he may set up in bar of a judgment against him as a garnishee. Firebaugh *v.* Stone, 36

§ 483. (i) **Must not be a claim arising from tort—Unliquidated damages.**—A claim which arises from a tort, and on which no judgment has been recovered, is not a debt within the meaning of the attachment law, and therefore can not be made the subject of garnishment. Neither can a claim which is for unliquidated damages only.¹ It makes no difference in this regard that the claim for unliquidated damages arises out of the breach of a contract.²

The fact that a verdict may have been rendered in an action of tort, or for other unliquidated damages, will not render the same susceptible of garnishment. A judgment must be pronounced thereon before the same will be a proper subject of garnishment proceedings.³

§ 484. **When no demand exists—Property possessed through fraud.**—By the older law it was held that one who was in the possession of the property of another upon a contract, which

Roper v. Holland, 3 Ad. & Ell. 99; *Graves v. Severens*, 37 Vt. 651; *Rindge v. Green*, 52 Vt. 204.

2. *Zerega v. McDonald*, 1 Woods 496; *Burrill v. Letson*, 2 Spears L. (S. C.) 378.

A claim for the non-performance of a lease is a claim for unliquidated damages and therefore not subject to garnishment process. *Eastman v. Thayer*, 60 N. H. 575.

A claim for a breach of warranty is not subject to garnishment process for like reason. *Capes v. Burgess* 135 Ill. 61, 25 N. E. Rep. 1000.

Garnishee's defenses. A statute in Maine does not permit the garnishee to set-off claims for "unliquidated damages for wrongs and injuries," but this refers to independent claims and not to such as arise out of the contract upon which the debt is founded. *Cota v. Mishow*, 62 Me. 124.

3. *Gamble v. Central R. & B. Co*, 80 Ga. 595, 7 S. E. Rep. 315; *Thayer v. Southwick*, 8 Gray (Mass.) 229.

Roper v. Holland, 3 Ad. & Ell. 99; *Eddy v. Heath*, 31 Mo. 141; *Warren v. Batchelder*, 15 N. H. 129; *Freeman on Executions*, §§ 162-167; *Cook v. Walthall*, 20 Ala. 334; *Victor v. Hartford Fire Ins. Co.*, 33 Iowa 210; *Foster v. Dudley*, 30 N. H. (10 Foster) 463; *Getchell v. Chase*, 37 N. H. 106.

1. *New Haven Saw Mill Co. v. Fowler*, 28 Conn. 103; *Holcomb v. Winchester*, 52 Conn. 447, s. c. 52 Am. Rep. 608; *Capes v. Burgess*, 135 Ill. 61, 25 N. E. Rep. 1000; *Ransom v. Hays*, 39 Mo. 445; *Paul v. Paul*, 10 N. H. 117; *Despatch Line of Packets v. Bellamy Manuf. Co.*, 12 N. H. 205; *Getchell v. Chase*, 37 N. H. 106; *Gove v. Varrell*, 58 N. H. 78; *Eastman v. Thayer*, 60 N. H. 575; *Foster v. Dudley*, 30 N. H. (10 Fost.) 463; *McKee v. Judd*, 12 N. Y. 622; *Barry v. Fisher*, 39 How. (N. Y.) Pr. 521; *Hugg v. Booth*, 2 Ired. (N. C.) 282; *Deaver v. Keith*, 5 Ired. (N. C.) 374; *Burrill v. Letson*, 2 Spears L. (S. C.) 378; *Selheimer v. Elder*, 98 Pa. St. 154;

was fraudulent as to creditors, could not be held liable as a garnishee; because there was no legal indebtedness from the possessor to the original owner, and the original owner could not have an action at law therefor.¹ However, this rule was so manifestly unjust that by force of many special statutes it is now the prevailing rule that a creditor has the right to garnish the property and effects of his debtor when they are in the possession or under the control of a third person, when they have been by him acquired through fraud against such creditors, although the owner might not himself be able to sustain an action therefor. Such a contract being void, the creditor is, by right, entitled to such property or effects for the satisfaction of his demand.²

Nevertheless, if the purchaser pays the full price he will not be liable as a garnishee although he conspire with the debtor to defraud his creditors.³

§ 485. Garnishment wholly a statutory proceeding—Can not be aided by garnishee.—The right of attachment by garnishment is not known to the common law. It depends wholly upon the provisions of the statute for its validity and effect, and it can not be extended beyond the strict provisions thereof. It may be directed against any person supposed to be indebted to the plaintiff's debtor, but its validity depends upon the pursuit of the steps prescribed by law for its prosecution and no aid can be lent to it by the voluntary acts of the garnishee.

1. *Ripley v. Severance*, 6 Pick. (Mass.) 474; *Baxter v. Currier*, 13 Vt. 615; *Hunter v. Case*, 20 Vt. 195. *Ante*, § 475 (a.)

2. *Sickman v. Abernathy*, 14 Colo. 174, 23 Pac. Rep. 447; *Treusch v. Ottenburg* 4 Cir. Ct. App. 629 54 Fed. Rep. 867, 6 U. S.-App. 403; *LaCrosse Nat. Bank v. Wilson*, 74 Wis. 391, 43 N. W. Rep. 153; *Fearey v. Cummings*, 41 Mich. 376, 1 N. W. Rep. 946; *Bresnahan v. Nugent*, 92 Mich. 76, 52 N. W. Rep. 735; *DeGraff v. Thompson*, 24 Minn. 452; *Blodgett v. Chaplin*, 48 Me. 322; *Eyermaun v. Kriekhaus*, 7

Mo. App. 455; *Van Ness v. McLeod*, 2 Idaho 1147, 31 Pac. Rep. 798; *Crane v. Stickles*, 15 Vt. 252; *Citizens' State Bank v. Council Bluffs Fuel Co.* (Iowa) 57 N. W. W. Rep. 444.

It has been said in Vermont that garnishment may be maintained where property has been fraudulently purchased to keep it from being attached and that the creditor is not obliged to try the validity of the sale by attaching the property. *Crane v. Stickles*, 15 Vt. 252.

3. *Jaseph v. Kronenberger* 120 Ind. 495, 22 N. E. Rep. 301.

Like attachment by seizure, its validity depends upon the proper performance of each and every act prescribed by the statute, and without the performance of any one of them the court is without jurisdiction, and the whole proceeding is void and will be reversed on error.¹

§ 486. **Legal rights and not equitable rights subject to garnishment.**—Garnishment is a proceeding at law assimilated to an attachment of personal property, and, therefore, legal rights only and not equitable rights can be reached by it. It is in substance and fact a proceeding *in rem* and must be tried like ordinary proceedings *in rem*; hence, equitable issues can not be injected into it.² Only such rights can be reached as the defendant could himself enforce by a suit at common law, and only such personal property as would be liable to seizure and sale if the sheriff could get possession of it.³

1. *Randolph v. Little*, 62 Ala. 396; *Dudley v. Falkner*, 49 Ala. 148; *Netter v. Board of Trade of Chicago*, 12 Ill. App. 607; *Schindler v. Smith*, 18 La. Ann. 476; *Phelps v. Boughton*, 27 La. Ann. 592; *Kennedy v. McLellan*, 76 Mich. 598; *Ford v. Detroit Dry Dock Co.*, 50 Mich. 358; *Sievers v. Woodburn, etc., Co.*, 43 Mich. 275; *Eaton v. Badger*, 33 N. H. 228; *Godding v. Pierce*, 13 R. I. 532; *Noyes v. Brown*, 75 Tex. 458; *Insurance Co. v. Friedman*, 74 Tex. 56.

2. *Thomas v. Hopper*, 5 Ala. 442; *Harrell v. Whitman*, 19 Ala. 135; *Haris v. Miller*, 71 Ala. 26; *King v. Payan*, 18 Ark. 583; *Hassie v. God, etc., Cong.*, 35 Cal. 378; *May v. Baker*, 15 Ill. 89; *Lowry v. Wright*, 15 Ill. 95; *Bigelow v. Andress*, 31 Ill. 322; *Webster v. Steele*, 75 Ill. 544; *Sears v. Thompson*, 72 Iowa 61; *Massachusetts Nat. Bank v. Bullock*, 120 Mass. 86; *Adams v. Mills*, 126 Mass. 278; *Benton v. Snyder*, 22 Minn. 247; *Sievers v. Woodburn S. W. Co.*, 43 Mich. 275; *Williams v. Gage*, 49 Miss. 777; *Lack-*

land v. Garesche, 56 Mo. 267; *Pratte v. Scott*, 19 Mo. 625; *Lee v. Tabor*, 8 Mo. 322; *Wood v. Edgar*, 13 Mo. 451; *Higgins v. McConnell*, 56 Hun (N. Y.) 277, 9 N. Y. S. 588; *Swann v. Summers*, 19 W. Va. 115.

3. *Godden v. Pierson*, 42 Ala. 370; *Roby v. Labuzan*, 21 Ala. 60; *Nesbitt v. Ware, etc.*, 30 Ala. 68.

Being a legal and not an equitable proceeding it will not lie in the adjustment of rights between partners. It will not reach any part of the indebtedness of a defendant to the co-partnership on his demand against an individual member of the firm. *Williams v. Gage*, 49 Miss. 777. After a balance has been struck so that an action of law might be maintained thereon, then a process of garnishment will be availing.

A beneficiary's interest in a life insurance policy before becoming due is purely equitable and can not be reached by garnishment. *Nims v. Ford*, 159 Mass. 575, 35 N. E. Rep. 100.

§ 487. **Effect of garnishment process.**—The suing out of a process in garnishment does not in any manner change the rights of the parties to the proceeding further than to transfer the right of the defendant to his creditor (the plaintiff) to proceed against the garnishee for the collection of the debt due to the principal defendant.¹ The effect of garnishment is to attach the debt,² and it reaches interests and effects that can not be taken on execution or attachment by seizure.³ It is a rule of universal application that the plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and can enforce no demand against the garnishee which the debtor himself, if suing, would not be entitled to recover. He is in no better position than his debtor was either as to the recovery of a debt from, or chattels in possession of, the garnishee. There is nothing in the attachment law which amplifies or extends the rights of the creditor, seeking its aid, in the subject attached, beyond those of his own debtor.⁴

This rule is applicable in a case in which it is sought to

1. *Myers v. Baltzell*, 37 Pa. St. 491; *Karnes v. Pritchard*, 36 Mo. 135; *McDermott v. Donegan*, 44 Mo. 85.

2. *Bryan v. Lashley*, 13 Sm. & M. (Miss.) 284.

3. *Patterson v. Caldwell*, 124 Pa. St. 455; *Haven v. Wentworth*, 2 N. H. 93.

4. *McGehee v. Walke*, 15 Ala. 183; *Hoskins v. Johnson*, 24 Ga. 625; *Samuel v. Agnew*, 80 Ill. 553; *Richardson v. Lester*, 83 Ill. 55; *Daniels v. Clark*, 38 Iowa 556; *Linder v. Murdy*, 37 Kan. 152; *Phelps v. Atchison*, T. & S. F. R. Co., 28 Kan. 165; *Board of Education v. Scoville*, 13 Kan. 17; *Ballio v. Poisset*, 8 Martin (La.) N. S. 336; *Cammack v. Floyd*, 10 La. Ann. 351; *National Bank, etc., v. Staley*, 9 Mo. App. 146; *Fitzgerald v. Hollingsworth*, 14 Neb. 188; *Haldeman v. Hillsborough & Cinn. R. R. Co.*, 2 Handy (Ohio) 101; *Baker v. Eglin*,

11 Ore. 333; *Patten v. Wilson*, 34 Pa. St. 299; *Baugh v. Kirkpatrick*, 54 Pa. St. 84; *Farmers', etc., Nat. Bank v. King*, 57 Pa. St. 202; *Coble v. Nonemaker*, 78 Pa. St. 501; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354; *Hutchins v. Hawley*, 9 Vt. 295; *Edson v. Sprout*, 33 Vt. 77; *Baltimore, etc., Ry. Co. v. McCullough*, 12 Gratt. (Va.) 595.

The only case in which this rule is inapplicable seems to be where the defendant, because of fraud, has no right of action against his debtor (the garnishee), and yet, because of special statute, his defrauded creditors may be permitted to secure the property by garnishment. *Ante*, § 484; *Edson v. Sprout*, 33 Vt. 77. But even then it seems to be inapplicable in Illinois. *Chatroop v. Borgard*, 40 Ill. App. 279. A creditor's bill would be there a proper remedy in such a case.

reach the interest of a debtor in property in possession of one having a lien upon the property; for until the lien is discharged by the payment of the sum of money which it secures, the owner himself could not recover possession of it, and, by the rule, the plaintiff can not.¹ It is also applicable in the case of agents, commission merchants or factors, who have made advances on the property, for until the same is paid the assignee or owner could not recover them.² And further if, for any reason, the property be in such situation that the defendant has lost his power over it, or has not yet acquired such an interest in, or power over, it as to permit him to take it and dispose of it, it can not be secured by garnishment for his debt.³ Likewise, if the defendant has not yet acquired control of the debt, as for example a future income under a will, a process in garnishment will not be available to secure the same to his creditor, the plaintiff.⁴ Another effect of this rule is, that the plaintiff is liable to be met by the garnishee on his own behalf with the same set-offs and other defenses that the garnishee might have interposed had an action been brought against him by his own creditor, the principal defendant in the garnishment proceedings.⁵ And after an answer is filed and issue joined, the same presumptions of law arise from any particular evidence on the trial as if there had been no attachment and the suit had been by the debtor against the garnishee.⁶

The garnishee stands, in every respect, in the same position that he would have been, had the suit been begun by his own creditor. The fact that a garnishment process has been served upon him places him in no worse position and under no greater liability than he would have been had an action at law been

1. *Adoue v. Seeligson, etc., Co.*, 54 Tex. 594.

2. *Baugh v. Kirkpatrick*, 54 Pa. St. 84.

3. *Strauss v. Railroad Co.*, 7 W. Va. 368.

4. *Daniels v. Clark*, 38 Iowa 556. See "Executors and Administrators," *post*, § 510..

As to the inability to recover future earnings, rents to become due, etc., see, *supra*, §§ 480 and 481.

5. *Hall v. Williams*, 120 Mass. 344; *Myers v. Baltzell*, 37 Pa. St. 491; *Karnes v. Pritchard*, 36 Mo. 135; *McDermott v. Donegan*, 44 Mo. 85.

6. *Fessler v. Ellis*, 40 Pa. St. 248.

brought against him by the principal defendant to whom he was indebted, or whose property he has in his possession.¹

§ 488. Same—No bar to a regular action on same demand.

—Although a judgment on the merits in a garnishment proceeding will be decisive and protect the garnishee from any subsequent action by his creditor (the principal defendant in the garnishee proceedings) yet the mere fact that a suit in garnishment is pending will not prevent such creditor from bringing a regular action at law against his debtor (the garnishee in the other suit) for, except to place the plaintiff in garnishment in a position of demanding of the garnishee the payment of the debt or the return of the property to which the defendant is entitled, the rights of the party are unimpaired by the pendency of the proceedings in garnishment, and until they are terminated such right is not finally effective.² The garnishee may, however, by the common law practice, when such regular action is brought against him by his creditor, plead in abatement the pendency of the garnishment proceedings; but he is not required to do so and if he does not a judgment first recovered in the regular action would defeat the garnishment proceeding.³ Efforts have been made, by injunction and otherwise, to prevent the principal defendant from collecting his demand against the garnishee, in order that such defendant's credits might be subjected to the payment of the debt he owes

1. *Whipple v. Robbins*, 97 Mass. 107; *St. Louis v. Regenfuss*, 28 Wis. 144; *Curtis v. Alvord*, 45 Conn. 569; *Bates v. Forsyth*, 69 Ga. 365; *National Bank v. Staley*, 9 Mo. App. 146; *Pundt v. Clary*, 13 Neb. 406; *ante*, §§ 470-474. Further see *post*, "Efficiency of Garnishment" in various cases.

2. *Hicks v. Gleason*, 20 Vt. 139; *Brown v. Scott*, 51 Pa. St. 357.

That the garnishee is not protected by a judgment against him entered because of his default, see, *ante*, § 473.

3. Compare *Watkins v. Field*, 6 Ark. 391; *Desha v. Baker*, 3 Ark. 509.

Proceedings in garnishment were begun in South Carolina against a Virginia corporation, which corporation, sought to show that it had been garnished in Virginia in a suit there brought against the plaintiff. It was held that the court should have admitted in evidence a certified copy of the proceedings in Virginia for the purpose of establishing such defense. *Mars v. Virginia Home Ins. Co.*, 17 S. Car. 514.

the plaintiff in garnishment.¹ And in some cases these credits have been sought to be reached by garnishment proceedings after the regular suit has been begun, but in no event can they be reached by garnishment after a verdict has been rendered in the regular action which the principal defendant has theretofore begun against his debtor, the garnishee.²

1. It is said in Alabama that a debt in attachment controverts the justice sued on in one county can not be attached by a creditor of the plaintiff in another county, when the defendant of the demand. *Bingham v. Smith*, 5 Ala. 651.
2. *Thayer v. Pratt*, 47 N. H. 470.

CHAPTER XXIV.

WHO MAY BE HELD AS A GARNISHEE.

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| <p>§ 489. The question determined by what is necessary to give the court jurisdiction.</p> <p>490. The general rule stated.</p> <p>491. Non-residents.</p> <p>492. Corporations. (a) Generally.</p> <p>493. (b) Foreign corporations.</p> <p>494. (c) Same—Being within the state not sufficient.</p> <p>495. (d) Same—Liable though both plaintiff and defendant non-residents.</p> <p>496. (e) Same—Agent or officer having possession as such can not be held as garnishee.</p> <p>497. (f) Same—Special fund or property pledged can not be held liable in its possession.</p> <p>498. Corporations—For stock of a member.</p> <p>499. Subscribers for stock in corporations.</p> <p>500. Not municipal corporations—</p> <p style="padding-left: 20px;">(a) General rule.</p> <p>501. (b) Application of the rule.</p> | <p>§ 502. (c) Objection—How raised—May be waived.</p> <p>503. (d) Not an officer having control of fund.</p> <p>504. (e) Debtors of municipal corporations may be held except for taxes.</p> <p>505. Not public officers. (a) Generally.</p> <p>506. (b) Liable when official duty ceases.</p> <p>507. (c) Liable for surplus retained.</p> <p>508. (d) Liability for property of prisoner, when.</p> <p>509. (e) Liable for funds deposited in his own name, when.</p> <p>510. Executors and administrators. (a) The old rule.</p> <p>511. (b) The new rule.</p> <p>512. (c) Representatives must be summoned as such.</p> <p>513. Guardians.</p> <p>514. Other officers and representative persons.</p> |
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§ 489. The question determined by what is necessary to give the court jurisdiction.—Whether or not one may be successfully made a garnishee is determined by the fact whether, by the service of process upon him, the court may acquire jurisdiction to appropriate the debt which he owes, or the property which he has in his possession or under his control. It is a fundamental principle of law in proceedings *in rem* that a court only has the power to appropriate property situate

within its territorial jurisdiction. This rule is applicable in proceedings by garnishment, and whether one can be held as garnishee or not depends upon whether the credit or chattel of the principal defendant which he possesses, is situate within the territorial jurisdiction of the court in which the garnishment proceedings are begun.

§ 490. **The general rule stated.**—That one may be held as a garnishee he must be indebted to the principal defendant, or be in possession of property belonging to him within the jurisdiction of the court. By the law relating to garnishment a debt has a *situs* or location like tangible property and the *situs* of the debt, for the purpose of determining jurisdiction, is the place where the garnishee lives, unless it is otherwise indicated. Therefore the garnishee, to be held by the process served on him, must generally reside within the jurisdiction of the court, or have personal property in his possession, or owe to the principal defendant a debt which is payable within the state.¹

Where a debt is made payable within a certain state, the *situs* of the debt is in that state and it can not be elsewhere secured by garnishment, unless by subsequent agreement between the parties it is made payable elsewhere.² But there are

1. Toledo, etc., R. Co. v. Reynolds, 72 Ill. 487; Missouri Pacific Ry. Co. v. Maltby, 34 Kan. 125; Stark v. Bare, 39 Kan. 100; Smith v. Eaton, 36 Me. 298; Hamilton v. Rogers, 67 Mich. 135, 34 N. W. Rep. 278; Allen v. Montgomery, 48 Miss. 101; Fielder v. Jessup, 24 Mo. App. 91; American Cent. Ins. Co. v. Hettler, 37 Neb. 849, 56 N. W. Rep. 711; Jones v. Winchester, 6 N. H. 497; Sawyer v. Thompson, 24 N. H. (4 Fost.) 510; Childs v. Digby, 24 Pa. St. 23; Commercial Natl. Bank v. Chicago M. & St. P. R. R. Co., 45 Wis. 172; McNeill v. Roache, 49 Miss. 437.

2. Hamilton v. Rogers, 67 Mich. N. W. Rep. 278; Renier v. 135, 34 Hurlbut, (Wis.) 50 N. W. Rep. 436.

A resident of Michigan contracted

specifically to pay a debt in New Mexico for which reason it was held that he could not be discharged from such liability by the payment of the money to a third person in Michigan, and therefore could not be held liable in Michigan as a garnishee; for if he were so held he would be twice liable to the payment of the debt. Hamilton v. Rogers, 67 Mich. 135, 34 N. W. Rep. 278.

On a policy of insurance made payable in Wisconsin the indebtedness arising thereunder has its *situs* in Wisconsin and can not be held subject to garnishment elsewhere. Renier v. Hurlbut, 81 Wis. 24, 50 N. W. Rep. 783.

The *situs* of a debt of an insurance company is not generally limited by

a few cases which hold that debts have no local *situs* and are suable in any locality where the debtor's person may be found and permit a debtor to be made a garnishee wherever process can be properly served upon him.¹ But these cases are in the minority and the general rule is contrary to them.²

Regarding the *situs*, when the property is in the possession or under control of the garnishee, it may be said that when the garnishee resides within the jurisdiction, the *situs* of the debt is there and it may there be secured by garnishment. Where the garnishee is a non-resident and the property is situate within the jurisdiction of the court it may be secured by a process served within the jurisdiction upon the non-resident garnishee. But where the property is situate within the jurisdiction of the court and the garnishee is a non-resident, the court will acquire no jurisdiction by a garnishment process properly served upon the garnishee within its jurisdiction.³ The matter or thing attached must be within the power and jurisdiction of the court. And the rule is applicable to certificates of stock, deeds of trust and other written evidences of debt.⁴ It is a well settled rule that choses in action are, with

the domicile of the company, but since it is generally payable where the loss by fire occurs, or where the person resides on whom the life policy was issued, the debt may generally be secured there by garnishment process served upon the resident agent of the company. *Neufelder v. German-American Ins. Co.*, 6 Wash. 336, 33 Pac. Rep. 870.

In this regard the rule that the *situs* of the debt is the place where the creditor resides does not deprive the courts of the state, in which the debtor resides, of jurisdiction of the proceedings to attach the debt by means of garnishment. In fact, the laws for attaching property of a non-resident necessarily assume that the property has a *situs* distinct from the owner's domicile. *Wyeth Hardware & Mfg. Co. v. Lang*, 54 Mo. App. 147. Further

as to "Foreign Corporations," see *post*, § 493.

1. *Sturtevant v. Robinson*, 18 Pick. (Mass.) 175; *East Tenn. Va. & Ga. Ry. Co. v. Kennedy*, 83 Ala. 462; *Blake v. Williams*, 6 Pick. (Mass.) 286; *Leiber v. U. P. Ry. Co.*, 49 Iowa 689.

2. *Post*, § 491.

3. *Molyneux v. Seymour*, 30 Ga. 440; *Reinhard v. Keith*, 3 Ind. 137; *Wales v. Alden*, 22 Pick. (Mass.) 245; *Moore v. Speed*, 55 Mich. 84; *King v. Holmes*, 27 N. H. (7 Fost.) 266; *Bowden v. Schatzell*, 1 Bailey (S. C.) Ch. 360; *Kinloch v. Meyer*, *Speers* (S. C.) Ch. 427; *Haffey v. Miller*, 6 Gratt. (Va.) 454; *Bates v. Chicago, etc., Ry. Co.*, 60 Wis. 296, s. c. 50 Am. Rep. 369; *Miller v. Hooe*, 2 Cranch Cir. Ct. 622.

4. *Jenkins v. Lester*, 131 Mass. 355;

reference to process of garnishment, considered to be local and not as following the person of the trustee wherever he may be transiently found.¹

The place where the goods are to be delivered, which the non-resident garnishee has under his control, is their *situs* and consequently determines the jurisdiction of the court when the goods are themselves not actually within the jurisdiction of the court when the writ is served upon the garnishee.²

§ 491. **Non-residents.**—Under the London custom, after which our attachment by garnishment is fashioned,³ a debt arising outside of the jurisdiction could not be attached within the city. It is also a well settled rule in this country that an inhabitant in another state is not chargeable as a garnishee, although he is within the jurisdiction of the court, where he has come for temporary purpose, and the process of garnishment is therein regularly served upon him.⁴ Such a person served with process of garnishment will be discharged, whenever the fact is brought to the attention of the court. It is a jurisdictional matter and not personal to the garnishee, therefore, he can not waive the objection.⁵

Berryman *v.* Sullivan, 21 Miss. (13 Sm. & M.) 65; Christmas *v.* Biddle, 13 Pa. St. 223.

1. Sawyer *v.* Thompson, 24 N. H. (4 Fost.) 510; Lawrence *v.* Smith, 45 N. H. 533.

2. Clark *v.* Brewer, 6 Gray (Mass.) 320; Jones *v.* Winchester, 6 N. H. 497; Young *v.* Ross, 31 N. H. (11 Fost.) 201.

3. *Ante*, § 465.

4. Tingley *v.* Bateman, 10 Mass. 343; Nye *v.* Liscombe, 21 Pick. (Mass.) 263; Hart *v.* Anthony, 15 Pick. (Mass.) 445; Ray *v.* Underwood, 3 Pick. (Mass.) 392; Gold *v.* Housatonic R. Co., 1 Gray (Mass.) 424; Allen *v.* Wright, 134 Mass. 347; Green *v.* Farmers', etc., Bank, 25 Conn. 452; Hughes *v.* Craig, 7 T. B. Mon. (Ky.) 226; Risewick *v.* Davis, 19

Md. 82; Columbus Ins. Co. *v.* Eaton, 35 Me. 391; Squair *v.* Shea, 26 Ohio St. 645; Cronin *v.* Foster, 13 R. I. 196; Baxter *v.* Vincent, 6 Vt. 614; Smith *v.* Chilton, 77 Va. 535; Tamm *v.* Williams, 2 Chitty 438, 3 Douglas 281; Crosby *v.* Hetherington, 4 Manning & Granger, 933; Day *v.* Paupierre, 7 Dowl. & Low. 12, 13 Adolphus & El. N. S. 802.

5. Rindge *v.* Green, 52 Vt. 204.

Although the garnishee, in a foreign attachment, may come in and allege in his answer that he was not an inhabitant when the suit was commenced and that he had not, when the writ was served, any goods, etc., of the principal defendant in his hands, the court will not, upon motion of the principal defendant, dismiss the *action* upon the ground that

Where, however, the garnishee is a resident of the state, the fact that the principal debtor is a non-resident will not affect the validity of the garnishment proceedings because attachments are permitted against non-resident debtors.¹ And the fact that the principal defendant is served by publication only, has no effect upon the jurisdiction of the court,² when the property or debt is within the power of the court; that is to say, where the property is within the jurisdiction of the court or the debt is payable therein.³ But where the garnishee and the principal debtor both reside without the state and the debt by its terms is payable elsewhere, a process of garnishment will, of course, be unavailing.⁴

it was brought in the wrong place. *Nash v. Brophy*, 13 Metc. (Mass.) 476.

1. *Crawford v. Elliott*, 1 Houst. (Del.) 465; *Wolf v. Tappan*, 5 Dana (Ky.) 361; *Bean v. Miss. Union Bank*, 5 Rob. (La.) 333; *Newland v. Reilly*, 85 Mich. 51, 48 N. W. Rep. 544; *Todd v. Mo., etc., R. R. Co.*, 33 Mo. App. 110; *Logan v. Simmons*, 6 Ired. (N. C.) Eq. 180; *Root v. Davis*, (Ohio Sup.) 36 N. E. Rep. 669; *Berry v. Davis*, 77 Tex. 191, 13 S. W. Rep. 978; *Nichols v. Hooper*, 61 Vt. 295; *Mattingly v. Boyd*, 20 How. (U. S.) 128.

When one, who is proceeded against as an absent or non-resident defendant, has a fixed and notorious residence in the state, the proceedings are not thereby rendered wholly void; but the defendant will be allowed to come in and make defense as a matter of course at any time before the sale of the property to a *bona fide* purchaser. *Jermain v. Langdon*, 8 Paige (N. Y.) 41.

2. *Root v. Davis*, (Ohio Sup.) 36 N. E. Rep. 669; *Berry v. Davis*, 77 Tex. 191, 13 S. W. Rep. 978.

The law providing for garnishment proceedings against a non-resident principal defendant has no applica-

tion to cases in which some of several defendants are non-residents and others are residents. *Wilson v. Reilly*, 82 Mich. 169, 46 N. W. Rep. 439; *Landsberg v. Bullock*, 79 Mich. 278.

3. *Ante*, § 490.

Where an absent defendant was sued and the garnishee served within the state, having the funds of the absent debtor in his hands, the court held that the garnishee might either retain the funds in his hands or pay them over to the attaching creditor; security being given in either case to refund the money in compliance with final judgment. *Mattingly v. Boyd*, 20 How. (U. S.) 128.

When a debt is contracted abroad with a view to the agency of a foreign partner or an expectation that it will be paid by him, the partner at home can not be charged as garnishee. *Kidder v. Packard*, 13 Mass. 80; further as to "Efficiency of Garnishment in case of Partnership," see, *post*, § 518 *et seq.*

4. *Lovejoy v. Albree*, 33 Me. 414; *Smith v. Eaton*, 36 Me. 298; *Tingley v. Bateman*, 10 Mass. 343; *Keating v. American Refrigerator Co.*, 32 Mo. App. 293.

But in such a case entry of appear-

Non-resident garnishee must defend.—When a non-resident is made a garnishee by being duly served with process, while temporarily within the jurisdiction of the court, he must appear and answer to the action and make a defense; for if he neglects to appear after due notice, judgment may be rightfully entered against him on his default.¹ Without a defense no presumption will arise concerning his non-residence, or concerning the fact of his not having property within the jurisdiction of the court, or owing a debt payable therein.

Non-resident garnishees doing business within the state may be made liable as will be subsequently shown.

§ 492. **Corporations**—(a) **Generally.**—A corporation is an artificial person existing only in the contemplation of the law, but it is permitted to sue and be sued in transitory actions arising *ex contractu* or *ex delicto* in any state. It has no corporate existence outside of the boundaries of the sovereignty by which it is created, and whether it is a domestic corporation or a foreign corporation depends upon whether it is created in this state or in another.² It is universally held that a corporation is a citizen of the state in which it is created.³ As a general rule it may be said that any corporation, either domestic or foreign, other than a municipal corporation, may be made a garnishee.⁴

ance by the non-resident principal defendant will give the court jurisdiction so far as the defendants are concerned. *Young v. Ross*, 31 N. H. 201; *Libbey v. Hodgdon*, 9 N. H. 394.

1. *Lawrence v. Smith*, 45 N. H. 533.

2. *Baltimore, etc., Ry. Co. v. Glenn*, 28 Md. 287; *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. (Va.) 445; *New Orleans, etc., Ry. Co. v. Wallace*, 50 Miss. 244. *Ante*, § 84.

3. *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Plimpton v. Bigelow*, 93 N. Y. 592, 597; *Sprague v. Hartford, P. & F. R. R. Co.*, 5 R. I. 233.

When a corporation is chartered in two or more states it is a resident in each and every one of the states in

which it is so chartered and can not be a non-resident in either. *Mahany v. Kephart*, 15 W. Va. 609; *Holland v. Mobile, etc., Railroad Co.*, 16 Lea (Tenn.) 414.

4. *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *First Nat. Bank v. Burch*, 80 Mich. 242; *Boone Co. v. Keck*, 31 Ark. 387; *Taylor v. Burlington, etc., R. R. Co.*, 5 Iowa 114; *Burton v. District Township of Warren*, 11 Iowa 166; *Larkin v. Wilson*, 106 Mass. 120; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421; *Libbey v. Hodgdon*, 9 N. H. 394; *Smith v. Boston, C. & M. Ry.*, 33 N. H. 337; *Pennsylvania R. R. Co. v. Peoples*, 31 Ohio St. 537; *Jones v. N. Y. & Erie R. R. Co.*,

§ 493. (b) **Foreign corporations.**—Foreign corporations are subject to the process of garnishment in all cases in which an original action may be commenced against them in the courts of this state to recover the debt in respect to which the garnishment process is served.¹ This is in harmony with the rule before stated that the demand must be one on which an action at law could be brought by the principal debtor.² Corporations are to be proceeded against as garnishees in the same manner and with like effect as individuals.³

A foreign corporation doing business within the state may generally be made a garnishee in that state when, by the laws of the state, service of process may be properly made upon it therein; when according to the jurisdictional rule⁴ the debt is payable within the state or the corporation has within its control property belonging to the principal defendant.⁵ But a

1 Grant (Pa.) 457; Baltimore, etc., R. Co. v. Gallahue, 12 Gratt. (Va.) 655; Bank of United States v. Merchants' Bank, 1 Rob. (Va.) 573.

When the debt is due within the state. In compliance with the general rule, ante, § 490, the interest of a non-resident in the property of a foreign commercial firm may be attached for a debt due to a citizen of this state. Frost v. White, 14 La. Ann. 140.

In Utah it is said that a railroad corporation is a domestic corporation of the territory where it does business, although organized under the laws of the United States; and, therefore, that a process in garnishment served on it in the territory will operate to hold the debt attached, though such debt be contracted in another territory. Losee v. McCarty, 5 Utah 528, s. c. Losee v. Ream, 17 Pac. Rep. 452. Assuming the unusual premise taken in this case, that a railroad is a domestic corporation in the state where it does business, the decision is in harmony with the general rule. Ante, § 490.

1. Myer v. Liverpool, etc., Ins. Co., 40 Md. 595.

2. Ante, §§ 475 and 476.

3. McDougal v. Board, etc., of Hennepin Co., 4 Minn. 184. See Holland v. Leslie, 2 Harr. (Del.) 306.

As to making a corporation a defendant in proceedings supplementary to an execution, in Indiana, see Wallace v. Lawyer, 54 Ind. 501.

4. Ante § 490.

5. Selma, etc., R. R. Co. v. Tyson, 48 Ga. 351; Roche v. Rhode I. Ins. Assn., 2 Ill. App. 360; Hannibal & St. J. R. R. Co. v. Crane, 102 Ill. 249; Cousens v. Lovejoy, 81 Me. 467, 17 Atl. Rep. 495; National Bank, etc., v. Huntington, 129 Mass. 444; Farnsworth v. Terre Haute, etc., R. R. Co., 29 Mo. 75; Fithian v. New York, etc., R. R. Co., 31 Pa. St. 114; and see Jones v. New York, etc., R. R. Co., 1 Grant (Pa.) Cas. 457; Barr v. King, 96 Pa. St. 485; Datz v. Chambers, (Pa. Com. Pl.) 3 Pa. Dist. R. 353.

The rule was applied to insurance companies in the following cases:

foreign corporation being casually within the state, by the presence of an officer, can not be made to submit to the service of process of garnishment.¹ The court acquires no jurisdiction in such cases.² The process of garnishment against a foreign corporation must issue where such corporation usually does business and has a resident officer or agent on whom service may be made;³ for in such instances only can a valid service be made.⁴

§ 494. (c) **Same—Being within the state not sufficient.**—Furthermore, the fact that a foreign corporation has members or officers residing within the jurisdiction of the court, and that its books and records are kept there, will not render it liable as a garnishee. It must have goods, effects, or credits within the state or its indebtedness be payable within the state, for, according to the jurisdictional rule,⁵ the court will not otherwise acquire jurisdiction of the thing to be appropriated.⁶

Weed Sewing Machine Co. v. Boutelle, 56 Vt. 570; *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. (Va.) 445; *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214; *Darlington v. Rogers*, 13 Phila. (Pa.) 102; *Henderson v. Schaas*, 35 Ill. App. 155; *Moore v. Gennett*, 2 Tenn. Ch. 375.

1. *Newell v. Great Western Ry. Co.*, 19 Mich. 336; *Willet v. Equitable Ins. Co.*, 10 Abb. Pr. (N. Y.) 193.

2. *Ante*, § 491.

3. *Lewis v. Denney*, 4 Cush. (Mass.) 588; *Conahan v. Cullin*, 2 Disney (Ohio)*1; *Cooper v. Bailey*, 52 Me. 230; *Lucas v. Nichols*, 5 Gray (Mass.) 309.

4. *Post*, § —.

5. *Ante*, § 490.

6. *Daniels v. Meinhard*, 53 Ga. 359; *South Carolina R. R. Co. v. McDonald*, 5 Ga. 531; *Hannibal & St. J. R. R. Co. v. Crane*, 102 Ill. 249, s. c. 40 Am. Rep. 581; *Buchanan County Bank v. Cedar Rapids*, Iowa Falls, etc., R. R. Co., 62 Iowa 494; *Wheat v. Platte*,

etc., R. R. Co., 4 Kan. 370; *Danforth v. Penny*, 3 Mete. (Mass.) 564; *Reagan v. Pacific R. R.*, 21 Mo. 30; *Wright v. Chicago, Burlington, etc., R. R. Co.*, 19 Neb. 175; *Willet v. Equitable Ins. Co.*, 10 Abb. (N. Y.) Pr. 193; *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5; *Straus v. Chicago Glycerine Co.*, 46 Hun (N. Y.) 216; *Towle v. Wilder*, 57 Vt. 622; *Bank of U. S. v. Merchants, etc.*, 1 Rob. (Va.) 573; *Mahany v. Kephart*, 15 W. Va. 609; *Brauser v. New England Fire Ins. Co.*, 21 Wis. 506.

The garnishment of an officer of a foreign corporation will not give the court jurisdiction when the officer answers that he has no property of the company in this state. *Wheat v. Platte*, etc., R. R. Co., 4 Kan. 370, and that no debt is owing here.

Where an English insurance company owes money to an Illinois corporation, doing business there, on an insurance policy issued and covering property in Illinois, it can not be made

No foreign corporation can be made liable as a garnishee while the amount of its indebtedness is uncertain or conditional.¹ The application of this rule is oftenest required in garnishment proceedings brought against insurance companies before the amount of the loss is determined, or when they have an option to pay the loss or rebuild.²

a garnishee in an action brought in New York against the Illinois corporation by service on the company's New York agent; because the presence of the defendant or the thing in the state in which the action is brought is necessary to jurisdiction. *Straus v. Chicago Glycerine Co.*, 46 Hun (N.Y.) 216.

Burden of proof.—The burden of proof is on the plaintiff to show the liability of the corporation. *Reagan v. Pacific R. R.*, 21 Mo. 30.

Evidence only to the effect that the debtor has been doing work for the corporation and that its books indicate that a balance on the contract with him remains unpaid will not be sufficient to render the corporation liable; it must also be made to appear that the balance has become an actual debt against the corporation and that the claim still belongs to the principal debtor. *Hewitt v. Wagar Lumber Co.*, 38 Mich. 701.

No demand is necessary before service of garnishment process upon a foreign corporation doing business in Illinois and having property there. *Hannibal & St. J. R. R. Co. v. Crane*, 102 Ill. 249, s. c. 40 Am. Rep. 581.

1. *Ante*, §§ 480–482.

2. *Bucklin v. Powell*, 60 N. H. 119; *Crescent Ins. Co. v. Moore*, 63 Miss. 419; *Nickerson v. Nickerson*, 80 Me. 100; 12 Atl. Rep. 880; *Stone v. Mutual Fire Ins. Co.*, 74 Md. 579, 22 Atl. Rep. 1051; *Hurst v. Home Protection Fire Ins. Co.*, 81 Ala. 174; *Building Assn.*

v. Laib, (Pa. Com. Pl.) 2 Pa. Dist. Rep. 473.

Where the company has, under the terms of the policy, elected to rebuild a structure destroyed by fire, instead of paying the loss, and has contracted for its erection, such company can not be garnished, even by a creditor of the insured, who has recovered judgment on a mortgage on the premises, executed after they had been insured, and although the premises were advertised for sale under the mortgage. *Stone v. Mutual Fire Ins. Co.*, 74 Md. 579, 22 Atl. Rep. 1051.

Where an insurance company was garnished and answered that the principal defendant held two policies of a thousand dollars each, on her stock of merchandise, on which there was unpaid a loss by fire of a thousand dollars, and that the company had not exercised an option under the policy "to repair, rebuild, or replace the property with other or like quality," the company was held liable, the court saying that the indebtedness was not uncertain or contingent. *Hanover Fire Ins. Co. v. Connor*, 20 Ill. App. 297. Unadjusted claims for loss on policy of insurance so permitted to be held in garnishment under particular circumstances in *Knox v. Protection Ins. Co.*, 9 Conn. 430; *Hays v. Lymcoming Fire Ins. Co.*, 99 Pa. St. 621.

But where a life insurance company is liable to deliver a paid-up policy to an assured to the extent of the premiums paid by him, the company

§ 495. (d) **Same—Liable though both plaintiff and defendant non-residents.**—Although both the plaintiff and defendant may be non-residents of the state, a foreign corporation doing business in the state may be garnished for a labor debt,¹ because such action is transitory; although it has been held in some states that the liability sought to be enforced by garnishment against a foreign corporation should be a direct liability to a resident plaintiff.²

§ 496. (e) **Same—Agent or officer having possession as such can not be held as garnishee.**—An agent or officer of a foreign corporation, though a resident of the state, can not be made liable as a garnishee in an action brought by a creditor of such corporation, when the agent served with garnishment process merely holds the funds or property in his official capacity. In such a case anything in his possession is already in the possession of the corporation itself, and property to be reached by garnishment must be in the hands of another than the principal debtor.³ The treasurer of a corporation is not liable as such to be held by process of garnishment in respect to moneys and evidences of debt belonging to the corporation,⁴

may be held as garnishee by the creditors of the assured, although no certain time was fixed for the delivery of such certain policy. *Tradesmen's Nat. Bank v. Cresson* (Pa. Com. Pl.) 10 Pa. Co. Ct. R. 57.

A Masonic benevolent mutual life insurance company may be held as garnishee by a representative of a deceased member of the corporation. Such money due is not an interest in the institution. *Geiger v. McLin*, 78 Ky. 232. And by a creditor of the heir of the deceased member. *Hankinson v. Page*, 31 Fed. Rep. 184.

1. *Burlington & M. R. R. Co. v. Thompson*, 31 Kan. 180; *Holland v. Mobile, etc., R. R. Co.*, 16 Lea (Tenn.) 414; *Mobile & O. R. Co. v. Barnhill* 91 Tenn. 395; 19 S. W. Rep. 21; *Missouri Pac. Ry. Co. v. Flannigan*, 47 Ill. App. 322.

2. *Myer v. Liverpool, etc.*, 40 Md. 595; *Merrick v. Van Santvoord*, 34 N. Y. 208.

In Alabama it is said that in such a case where the labor was rendered in the other state, garnishment will not be effective, as the debt can not be brought under the legal control of the court, even though there be a statutory provision for serving process on foreign corporations in such cases. *Alabama G. S. R. Co. v. Chumbey*, 92 Ala. 317, 9 So. Rep. 286.

3. *First National Bank v. Bristol Iron and Steel Co.*, (Pa. Com. Pl.) 12 Pa. Co. Ct. Rep. 176; *Galena and Southern Wisconsin R. R. Co. v. Stahl*, 103 Ill. 67; *Mueth v. Schardin*, 4 Mo. App. 403.

4. *Woodman v. York, etc.*, R. R. Co., 45 Me. 207; *Sprague v. Steam,*

and held by him as treasurer, at suit of a creditor of the corporation for the recovery of a debt due from the corporation; neither is the president, superintendent,¹ nor other fiscal officer of the corporation.² Money collected from the sale of tickets and from freight collected in the hands of an agent can not be secured by garnishment in a suit against the company by one of its creditors.³

§ 497. (f) Same—Special fund or property pledged can not be held liable in its possession.—Money of a corporation set

etc., Co., 52 Me. 592; *Lewis v. Smith*, 2 Cranch Cir. Ct. 571; *Bowker v. Hill*, 60 Me. 172; *Mueth v. Schardin*, 4 Mo. App. 403; *Neuer v. O'Fallon*, 18 Mo. 277; *Taft v. Mills*, 5 R. I. 393; *Dunlap v. Mills*, 5 R. I. 393; *McCraw v. Memphis, etc., R. R. Co.*, 5 Coldw. (Tenn.) 434.

1. *Bobbins v. Orange, etc., R. R. Co.*, 37 Ga. 240.

2. *Wilder v. Shea*, 13 Bush (Ky.) 128. *Contra* *Everdell v. Sheboygan, etc., R. R. Co.*, 41 Wis. 395; *First Nat. Bank v. Davenport, etc., R. R. Co.*, 45 Iowa 120; *Gilman v. Illinois & Miss. Telegraph Co.*, 1 McCrary, Cir. Ct. 170.

Remedy is by bill in equity.—When funds are in the hands of a resident officer or agent of a foreign corporation, a creditor's remedy is by bill in equity to discover the property and for a receivership. *Wilder v. Shea*, 13 Bush (Ky.) 128.

3. *Fowler v. Pittsburgh, etc., R. R. Co.*, 35 Pa. St. 22; *Pettingill v. Androscoggin R. R. Co.*, 51 Me. 370.

Earnings of a railroad company while in the hands of a bailee are the subject of garnishment at suit of judgment creditors, in Alabama, and such attachment lien will be preferred to liens of mortgagees, who file their bills to foreclose subsequently to the garnishment proceeding. *Johnston v. Riddle*, 70 Ala. 219.

In New Hampshire it is said, that since one railway company may be held as a garnishee of another for money collected from passengers and freight, there is no reason why an individual collecting such money for a railroad company should not as well be held liable. *Littleton Nat. Bank v. P. & O. R. R.*, 58 N. H. 104; compare also, *Smith v. Boston, etc., Railroad*, 33 N. H. 337.

But in Massachusetts, a railroad company which makes monthly settlements and payments of sums collected for companies whose roads lie beyond, is not liable as a garnishee of that company for sums found to be due to it and for which it is liable to the other company under the agreement. *Chapin v. Connecticut River R. R. Co.*, 82 Mass. (16 Gray) 69.

In West Virginia where, by the legislature, one corporation is empowered to assume the charge of a part of the property and franchise of another corporation and is required to account to a court for its acts, a creditor of the corporation, whose property is thus taken in charge, and who has issued an execution against its property, can not enforce his claim by garnishment process issued against the corporation so taking charge. *Swann v. Summers*, 19 W. Va. 115.

aside as a sinking fund for the payment of certain debts,¹ or bonds pledged as collateral security,² can not be reached by process of garnishment in the hands of the agent, bailee, or officer.³ But where earnings of a road were mortgaged to pay certain bonds, and it was a condition of such mortgage that until default in the payment of the bonds the company might possess and use the road, etc., and receive the rents, profits and increase arising therefrom, such earnings may be reached before foreclosure or possession taken by trustee or receiver, by other creditors of the corporation.⁴

The rules regarding the application by garnishment process of property in the hands of agents, bailees, or officers; and of property subject to pledge or lien and debts dependent upon conditions precedent, or other uncertainties, will be more properly considered when we come to treat of the "Efficiency of Garnishment."⁵

§ 498. **Corporations—For stock of a member.**—Without the special provision of a statute, a corporation can not be held liable as a garnishee for stock the principal debtor owns therein. This is on the principal that the stock he owns is not a "debt" due to him from the corporation within the meaning of the rule,⁶ because a "debt" means a liquidated sum of money which the garnishee owes to the principal defendant.⁷ And

1. *Galena & Chicago W. Ry. Co. v. Menzies*, 26 Ill. 121.

2. *Galena, etc., Ry. Co. v. Stahl*, 103 Ill. 67.

3. A treasurer of a corporation is not chargeable as a garnishee either for funds held by him officially or for funds pledged to him to secure an indebtedness owing to him by the corporation. *Bowker v. Hill*, 60 Me. 172.

4. *Mississippi, etc., R. R. Co. v. United States Express Co.*, 81 Ill. 534.

5. *Post*, Chaps. xxv and xxvi.

6. *Ante*, § 479.

7. *Planters, etc., Bank v. Leavens*, 4 Ala. 753; *Haley v. Reid*, 16 Ga. 437; *Ross v. Ross*, 25 Ga. 297; *Rhea v.*

Powell, 24 Ill. App. 77; *Foster v. Potter*, 37 Mo. 525; *United States v. Vaughan*, 3 Binn. (Pa.) 394; *Christmas v. Biddle*, 13 Pa. St. 223; *Evans v. Monot*, 4 Jones (N. C.) Eq. 227.

A board of trade was not held liable as a garnishee where the defendant held a certificate of membership in such board. *Netter v. Chicago Board of Trade*, 12 Ill. App. 607. As to attachment of certificates of stock by direct seizure, see *ante*, § 30. It is sometimes held that this can not be done because nothing can be thereby obtained but the manual possession of the certificate, and that such seizure and possession will create no lien,

because the attached shares of stock can not be transferred to the plaintiff on a judgment.¹

On the contrary by the special provision of many statutes, shares of stock in a corporation may be attached by garnishment process served upon the corporation, because such stock is deemed to be personal property and as such is the subject of sale, mortgage, or pledge and liable on execution, and may therefore be the subject of garnishment when such stock is in possession or under control of the corporation.² This rule is applicable only where the defendant, the plaintiff's debtor, has the legal title to the stock.³ Where certificates have not yet been issued and their issuance and the disposition of them may be controlled by the court, the stock may be reached by garnishment in the hands of the corporation in question.⁴ It has no application to a case where the defendant is non-resident and has, in another state of which he is a resident, assigned the certificates, although no transfer has been made on the company's books,⁵ in a case in which it is not provided that the stock is "assignable only on the books" of the corporation.⁶

Duncanson v. National Bank of the Republic, 7 Mackey (Dist. of Col.) 348; and a sale thereof convey no title to the stock. *Armour Bros. Banking Co. v. Smith*, 113 Mo. 12, 20 S. W. Rep. 690.

1. *Gardiner v. Bank of Pennsylvania*, 4 Yeates (Pa.) 377.

2. *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Colt v. Ives*, 31 Conn. 25; *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571; *Castle v. Carr*, 16 N. J. L. (1 Harr.) 394; *Plimpton v. Bigelow*, 63 How. (N. Y.) Pr. 484; *Johns v. Johns*, 1 Ohio St. 350; *Stone v. Elliott*, 11 Ohio St. 252; *National Bank v. Lake Shore, etc., Ry. Co.*, 21 Ohio St. 221; *Norton v. Norton*, 43 Ohio St. 509; *Montidónico v. Page*, 10 Heisk. (Tenn.) 443; *Chesapeake, etc., Ry. Co. v. Paine*, 29 Gratt. (Va.) 502.

3. *Illinois Anglo-American Storage*

Battery Co. v. Long, 41 Ill. App. 333; *Weller v. J. B. Pace Tobacco Co.*, 2 N. Y. S. 292.

4. *Illinois Anglo-American Storage Battery Co. v. Long*, 41 Ill. App. 333.

When a question arises as to priority between a vendee and an attaching creditor of the vendor and it appears that the instrument of transfer or assignment was executed prior in point of time to the service of the writ, then, if the purchase was made in good faith and for a valuable consideration, his title ought to prevail, provided he has done all the law has required of him and all that it was possible for him to do in taking possession, as the nature of the property will admit. *Colt v. Ives*, 31 Conn. 25.

5. *Weller v. J. B. Pace Tobacco Co.*, 2 N. Y. S. 292.

6. *Madison Lumber Co. v. Batavian*

Stock pledged as collateral security which is regularly transferred to the pledgee on the books of the company (when the same is necessary) can no longer be held by service of garnishment served upon the pledgor. The pledgee is the only proper garnishee.¹ Stock of a foreign corporation owned by a non-resident held in trust in this state can not here be subjected to garnishment process.² It is not such personal property in possession, or debt due in this state, as to bring it within the jurisdictional rule.³

§ 499. **Subscribers for stock in corporations.**—Regarding the possibility of holding a subscriber for stock in the corporation as a garnishee, the general rule may be stated to be, that when one has subscribed for stock and the money for the price thereof, or any of it, is due to the corporation at a fixed time, such subscriber may be made a garnishee by a creditor of the corporation; but when the corporation itself can not collect the amount without a formal call made upon the shareholders equally, then the stockholder's (the subscriber's) liability to third persons for his portion of the subscription can not be enforced by process of garnishment.⁴ This is on the principle *Bank*, 71 Iowa 270, 32 N. W. Rep. 336; *Ryan v. Campbell*, 71 Iowa 760, 32 N. W. Rep. 336.

Where stock is "assignable only on the books of the corporation," an assignment of it not recorded on the books passes to the assignee only an equitable or executory right to the stock, and therefore the assignee's right is not attachable. *Lippitt v. American Wood Paper Co.*, 15 R. I. 141, 23 Atl. Rep. 111.

1. *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. Rep. 113; *Edwards v. Beugnot*, 7 Cal. 162; *Morton v. Grafplin*, 69 Md. 545, 15 Atl. Rep. 298; *Cooke v. Hallett*, 119 Mass. 148.

In Massachusetts one who has secured the payment of a debt by giving a certificate of stock as collateral security therefor can not be held liable as garnishee of the creditor,

although summoned as such before the stock has been transferred on the books of the company. *Cooke v. Hallett*, 119 Mass. 148.

2. *Smith v. Downey*, 8 Ind. App. 179, 34 N. E. Rep. 823.

3. *Ante*, § 490.

A certificate of stock transferred in blank is not a negotiable instrument, nor can one holding stock as trustee pledge it to secure his own independent debt, and one who contemplates taking it is put upon inquiry as to the manner in which it is held. *Shaw v. Spencer*, 100 Mass. 382; *Sewall v. Boston Water Power Co.*, 4 Allen (Mass.) 282.

4. *Brown v. Union Ins. Co.*, 3 La. Ann. 177; *Bingham v. Rushing*, 5 Ala. 403; *De Mony v. Johnston*, 7 Ala. 51; *Teague v. Le Grand*, 85 Ala.

that the plaintiff in garnishment can not hold the garnishee liable for any demand, except one on which the principal defendant—the garnishee's creditor—could himself maintain an action at law.¹ An unpaid subscription for stock of a corporation is an asset of such corporation and, when due, the company may maintain an action of law therefor, and consequently it is susceptible of garnishment.² One who has subscribed for stock to be paid in monthly installments may be held as a garnishee as the installments become due, if unpaid.³

Money due on an unpaid call may be secured by process of garnishment served upon the stockholder;⁴ but an unpaid subscription to the capital stock which has not been called for or assessed can not be secured by garnishment, because no cause of action could be maintained therefor by the corporation.⁵

493, 5 So. Rep. 287; *Davis v. Montgomery Furnace & Chemical Co.*, 101 Ala. 127, 8 So. Rep. 496; *Joseph v. Davis*, (Ala.) 10 So. Rep. 830; *Nicrosi v. Irvine*, 102 Ala. 648, 15 So. Rep. 429; *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. Rep. 890; *Meints v. East St. Louis Rail Mill Co.*, 89 Ill. 48; *Pease v. Underwriters' Union*, 1 Ill. App. 287; *McKelvey v. Crockett*, 18 Nev. 238; *Woodhouse v. Commonwealth Ins. Co.*, 54 Pa. St. 307; *Peterson v. Sinclair*, 83 Pa. St. 250; *Balliet v. Brown*, 103 Pa. St. 546; *Lane's Appeal*, 105 Pa. St. 49; *Faull v. Alaska Gold and Silver Mining Co.*, 8 Sawyer Cir. Ct. 420, s. c. 14 Fed. Rep. 657; *In re Glen Iron Works*, 17 Fed. Rep. 324.

1. *Sangamon C. M. Co. v. Richardson*, 33 Ill. App. 277; *ante*, §§ 475 and 482.

A corporation may maintain an action at law against a stockholder for his subscription. It is not obliged to resort to a sale of his shares. *Rockville, etc., Turnp. Road v. Maxwell*, 2 Cranch Cir. Ct. (U. S.) 451.

Subscription to be paid by another.—

One was held liable as a garnishee who had signed a subscription to take certain shares of stock of a corporation "to be paid for by Peck." *Langford v. Ottumwa Water Power Co.*, 59 Iowa 283.

Holder of gratuitous stock.—The capital of a moneyed corporation is a fund for the payment of its debts, and one who accepts and holds a certificate of shares is liable to the responsibilities of a subscriber for stock. *Upton v. Tribilcock*, 91 U. S. 45, and cases there cited.

2. *Joseph v. Davis*, (Ala.) 10 So. Rep. 830.

3. *Davis v. Montgomery Furnace & Ch'm'l Co.*, 101 Ala. 127, 8 So. Rep. 496.

4. *Faull v. Alaska G. & S. M. Co.*, 8 Sawyer 420, s. c. 14 Fed. Rep. 657.

5. *In re Glenn Iron Works*, 17 Fed. Rep. 324; *Teague v. Le Grand*, 85 Ala. 493, 5 So. Rep. 287; *McKelvey v. Crockett*, 18 Nev. 238; *Lane's Appeal*, 105 Pa. St. 49; *Faull v. Alaska G. & S. M. Co.*, 8 Sawyer Cir. Ct. 420, s. c. 14 Fed. Rep. 657.

In Illinois judgment must first be recovered against the corporation on

However, when a debt not due may be secured by process of garnishment, the statute may be comprehensive enough to embrace a case where a stockholder is liable to the corporation for unpaid assessments or calls on subscriptions to stock of an insolvent corporation, although the same is not yet due.¹

Furthermore, where by statute, a stockholder or director of a corporation is liable on certain demands to an amount exceeding his paid-up stock, such liability is founded upon contract and may be enforced by process of garnishment.²

§ 500. Not municipal corporations — (a) General rule. — Considerations of public policy, it is said, prevent the law from permitting a municipal corporation to be held as garnishee, on a process issued to subject the supposed indebtedness

the debt due from the corporation. *Meints v. East St. Louis Rail Mill Co.*, 89 Ill. 48; *Pease v. Underwriters' Union*, 1 Ill. App. 287, for no attachment can there issue until after judgment and execution against the principal debtor.

Where notice of call to be given. — If the stockholder is not required to pay a call until a certain number of days written or printed notice is given to him, he can not be held liable as a garnishee until after the time allowable has expired. *Universal Fire Ins. Co. v. Tabor*, 16 Col. 531, 27 Pac. Rep. 890.

Subscription liable to be called. — As to securing balance on shares of stock, which was liable to be called, see *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 571.

Joint writ. — In Alabama two or more stockholders may be summoned in the same writ by a judgment creditor of the corporation, though they be severally indebted to the corporation for unpaid stock thereof. *Curry v. Woodward*, 53 Ala. 371.

Pleading. — Where the board of directors of a corporation had, by reso-

lution, required subscriptions to be paid to its treasurer in installments at certain times and places, it is material to the right of the plaintiff to recover the unpaid installments of stock to allege such fact and by averment show that the same has become due. *Mansfield, etc., Ry. Co. v. Hall*, 26 Ohio St. 310.

The answer of garnishee, showing that he has paid all calls made by the president and director is *prima facie* sufficient to prevent his being held responsible in garnishment. *Bingham v. Rushing*, 5 Ala. 403.

Payment in fictitious value. — It is said that where a stockholder has paid for his stock in property at an agreed fictitious value that he can not thereafter be held liable to garnishment by a creditor of the corporation for the difference between the face value of the stock and the value of the property. *Nicrosi v. Irvine*, 102 Ala. 648, 15 So. Rep. 429.

1. *In re Glen Iron Works*, 17 Fed. Rep. 324.

2. *Field v. Haines*, 28 Fed. Rep. 919.

of such corporation to a third person, to the satisfaction of the plaintiff's claim. The reason given why a municipal corporation may not be held as a garnishee is that such corporation holds the funds in a legal capacity and not as an individual.¹

However, in Montana, a municipal corporation is held to be a "person" within the meaning of the statute, and it is there said that such construction of the statute is not contrary to public policy, and does not tend to impede the exercise of its

1. *First Nat. Bank v. City of Ottawa*, 43 Kan. 294, 23 Pac. Rep. 485; *Parsons v. McGavock*, 2 Tenn. Ch. 581; *Clark v. Mobile School Comrs.*, 36 Ala. 621; *Born v. Williams*, 81 Ga. 796, 7 S. E. Rep. 868; *Bank of Southwestern Georgia v. City of Americus*, 92 Ga. 361, 17 S. E. Rep. 287; *City of Chicago v. Halsey*, 25 Ill. 485; *Merwin v. Chicago*, 45 Ill. 133; *Wallace v. Lawyer*, 54 Ind. 501; *Clapp v. Walker & Davis*, 25 Iowa 315; *Jenks v. Osceola Township*, 45 Iowa 554; *Switzer v. Wellington*, 40 Kan. 250; *Hawthorn v. St. Louis*, 11 Mo. 59; *People v. Mayor of Omaha*, 2 Neb. 166; *Greer v. Rowley*, 1 Pittsburg (Pa.) 1; *City of Erie v. Knapp*, 29 Pa. St. 173; *City of Memphis v. Laski*, 9 Heisk. (Tenn.) 511; *Burnham v. Fond du Lac*, 15 Wis. 193; *Buffham v. City of Racine*, 26 Wis. 449; *Merrell v. Campbell*, 49 Wis. 535; *Columbia Brick Co. v. District of Columbia*, 1 App. D. C. 351.

The "Government" may not be made a garnishee. *Wilson v. Bank of Louisiana*, 55 Ga. 98.

The *State* can not be made a garnishee. *Wind v. Ferguson*, 23 La. Ann. 752; *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 420; *Tracy v. Hornbuckle*, 8 Bush. (Ky.) 336; *McMeekin v. State*, 9 Ark. 553. Nor can a state institution, such as a hospital or lunatic asylum. *Dewey v. Garvey*, 130 Mass. 86.

The *District of Columbia* can not be made a garnishee. *Derr v. Lubey*, 1 McArthur (D. C.) 187; *Pottier, etc., Mfg. Co. v. Taylor*, 3 McArthur (D. C.) 4; *Brown v. Finley*, 3 McArthur (D. C.) 77.

A *county* or "borough" can not be made a garnishee. *Van Volkenburgh v. Earley*, 1 Luzerne Legal Register 216; *Pettebone v. Beardslee*, 1 Luzerne Legal Register 180; *Boone Co. v. Keck*, 31 Ark. 387; *Gilman v. Contra Costa Co.*, 8 Cal. 52; *Dotterer v. Bowe*, 84 Ga. 769; *State v. Eberly*, 12 Neb. 616; *Merrell v. Campbell*, 49 Wis. 535, s. c. 35 Am. Rep. 785; *People v. Mayor of Omaha*, 2 Neb. 166; *Fortune v. St. Louis*, 23 Mo. 239.

A *city* can not be made a garnishee. *Hawthorn v. St. Louis*, 11 Mo. 59; *City of Dallas v. Western Electric Co.*, 83 Tex. 243, 18 S. W. Rep. 552.

The *town* can not be made a garnishee. *Brown v. Heath*, 45 N. H. 168; *Bradley v. Richmond*, 6 Vt. 121.

A *school district* is a municipal corporation and as such can not be subjected to process of garnishment. *Born v. Williams*, 81 Ga. 796; *Clark v. Mobile School Comrs.*, 36 Ala. 621; *School District v. Gage*, 39 Mich. 484; *Seeley v. Board of Education*, 39 Mich. 486, note; *Dollman v. Moore*, 70 Miss. 267, 12 So. Rep. 23; *Kein v. School District of City of Carthage*, 42 Mo. App. 460.

functions or impair the usefulness of its servants.¹ A few other states, and notably by later statutes, are permitting municipal corporations to be held as garnishees in the same manner as natural persons and other corporations,² which fact seems to indicate a tendency toward the reversal of the old rule. One statute specifies that the process may issue against "any corporation or person."³

§ 501. (b) **Application of the rule.**—The general rule, that a municipal corporation may not be held as a garnishee for a debt due by it to a third person, has been applied where it was sought to subject an unpaid balance due to contractors, subcontractors and material men⁴ on school houses⁵ and other public buildings,⁶ for grading and paving⁷ and for other contracts of employment.⁸ The rule has been more frequently applied, however, where it has been sought to secure parts of the salary due from a municipal corporation to its officers.⁹

1. *Waterbury v. Board Comrs. Deer Lodge County*, 10 Mont. 515, 26 Pac. Rep. 1002.

2. *Bray v. Wallingford*, 20 Conn. 416; *City of Denver v. Brown*, 11 Colo. 337, 18 Pac. Rep. 214; *Adams v. Tyler*, 121 Mass. 380; *Mayor, etc., v. Horton*, 38 N. J. L. 88; *Wilson v. Lewis*, 10 R. I. 285.

But on a joint contract, though made with a man and his wife, a town was not held liable in garnishment on a judgment against one (the husband) alone. *Brown v. Collins*, (R. I.) 27 Atl. Rep. 329.

3. *Switzer v. City of Wellington*, 40 Kan. 250, 19 Pac. Rep. 620.

The school district comes within this rule in these states and may be held as garnishee. *Waterbury v. Board of Commissioners*, 10 Mont. 515, 26 Pac. Rep. 1002; *Whalen v. Harrison*, 11 Mont. 63, 27 Pac. Rep. 384; *McLoud v. Selby*, 10 Conn. 390.

4. *Columbia Brick Co. v. District of Columbia*, 1 App. D. C. 351.

5. *Born v. Williams*, 81 Ga. 796, 7 S. E. Rep. 868.

6. *Bank of Southwestern Georgia v. City of Americus*, 92 Ga. 361, 17 S. E. Rep. 287.

7. *Greer v. Rowley*, 1 Pittsburg (Pa.) 1.

8. *City of Memphis v. Laski*, 9 Heisk. (Tenn.) 511.

9. *Mayor, etc., of Mobile v. Rowland*, 26 Ala. 498; *Clark v. Mobile School Comrs.*, 36 Ala. 621; *McMeekin v. State*, 9 Ark. 553; *McClellan v. Young*, 54 Ga. 399; *Rodman v. Musselman*, 12 Bush. (Ky.) 354; *Wild v. Ferguson*, 23 La. Ann. 752; *Mayor, etc., of Baltimore v. Root*, 8 Md. 95; *Keyser v. Rice*, 47 Md. 203; *Walker v. Cook*, 129 Mass. 577; *Fortune v. St. Louis*, 23 Mo. 239; *Hawthorn v. City of St. Louis*, 11 Mo. 59; *Sheppard v. Cape Girardeau County*, (Mo.) 1 S. W. Rep. 305; *Waldman v. O'Donnell*, 57 How. (N. Y.) Pr. 215; *Pierson v. McCormick*, 1 Pa. Law Jour. Rep. 260; *Bank of Tennessee v. Dibrell*, 3

By an application of the rule, the salaries or earnings of teachers of public schools can not be secured by process of garnishment served upon the corporation or board owing them.¹ In the same manner fees due to jurors have been beyond the reach of garnishment process.²

Bill in equity—The proper remedy.—Where an officer of a municipal corporation or other person is beyond the reach of a personal judgment at law, and has money belonging to him in the treasury of such municipal corporation, a bill in equity is suggested as the proper remedy to subject it to the payment of his debts.³

§ 502. (c) **Objection—How raised—May be waived.**—The objection that a municipal corporation can not be held liable to a garnishment process need not, of necessity, be made by a formal answer, but may be raised on mere motion at any time after process served.⁴ The objection, however, is a privilege personal to the corporation itself and not a matter of juris-

Sneed (Tenn.) 379; *Derr v. Lubey*, 1 McArthur (D. of C.) 187.

In Georgia a statute permits the seizure by garnishment of a salary which exceeds \$500. *Bailie v. Mosher*, 72 Ga. 740; *Holt v. Experience*, 26 Ga. 113.

In Ohio salaries of officers of incorporated cities may be subjected by their judgment creditors to process of garnishment. *City of Newark v. Funk*, 15 Ohio St. 462.

In Minnesota a United States voucher which was the property of the principal defendant and which was given him not for "official services" but for *personal* services, has been subjected by process of garnishment to the satisfaction of his debt. *Leighton v. Heagerty*, 21 Minn. 42.

After salary withdrawn rule not applicable.—In Kentucky after the fees of a public officer are withdrawn from the treasury and in the hands of an

agent, they are attachable. *Kennedy v. Aldridge*, 5 B. Mon. (Ky.) 142.

1. *Bates v. Bates*, 74 Ga. 105; *Hightower v. Slaton*, 54 Ga. 108; *Hadley v. Peabody*, 13 Gray (Mass.) 200.

2. *Simons v. Whartenaby*, 2 Pa. Law Jour. Rep. 438; *Clark v. Clark*, 62 Me. 255; *Williams v. Boardman*, 9 Allen (Mass.) 570; *Geer v. Chapel*, 11 Gray (Mass.) 18.

The rule is to the contrary in states where a municipal corporation may be held as garnishee for sums due its officers. *Wardwell v. Jones*, 58 N. H. 305.

A school teacher, in Connecticut, is not a public officer, and hence his salary is not free from attachment. *Seymour v. Over River School District*, 53 Conn. 502.

3. *Pendleton v. Perkins*, 49 Mo. 565.

4. *Merwin v. City of Chicago*, 45 Ill. 133; *Jenks v. Osceola Township*, 45 Iowa 554.

diction; because of this and also because of the fact that a sovereignty may consent to be sued, a municipal corporation may waive its exemption from garnishment. A municipal corporation, by appearing and submitting to the liability, has thereby waived its exemption and becomes liable to the judgment of the court, in such a case, in the same manner as other corporations and private individuals.¹

§ 503. (d) **Nor an officer having control of fund.**—Under the general rule a sum of money in the hands of the treasurer or other officer of a municipal corporation, while held by him in his official capacity, is beyond the reach of a process of garnishment to secure a debt due from such municipal corporation to a third person—the principal defendant. This is true whether such defendant be another officer of such corporation or whether he have a demand arising from other contract relations.²

In the case of school teacher's wages, neither the board of trustees or directors, nor the treasurer of the board can be

1. *Briscoe v. Bank*, 11 Peters (U. S.) 257; *Board, etc., of Las Animas County v. Bond*, 3 Col. 411; *Clapp v. Walker & Davis*, 25 Iowa 315. *Contra*, *Porter & B. Hardw. Co. v. Perdue*, (Ala.) 16 So. Rep. 713; *Van Cott v. Pratt*, (Utah) 39 Pac. Rep. 827.

2. *Edmondson v. De Kalb County*, 51 Ala. 103; *Stillman v. Isham*, 11 Conn. 124; *Chealy v. Brewer*, 7 Mass. 259; *Wilson v. Bank of Louisiana*, 55 Ga. 98; *Fast v. Wolf*, 38 Ill. App. 27; *Millison v. Fisk*, 43 Ill. 112; *Triebel v. Colburn*, 64 Ill. 376; *Wild v. Ferguson*, 23 La. Ann. 752; *Droz v. East Baton Rouge Parish*, 36 La. Ann. 340; *Mayor of Baltimore v. Root*, 8 Md. 95; *Proctor v. Lane*, 62 N. H. 457; *Lodor v. Baker*, 39 N. J. L. 49; *Waldman v. O'Donnell*, 57 How. (N. Y.) Pr. 215; *Overseers of Pittstown v. Overseers of Plattsburgh*, 18 Johns. (N. Y.) 407, 418; *Neuer v. O'Fallon*, 18 Mo. 277; *Bank of Tennessee v. Dibrell*, 3 Sneed (Tenn.) 379; *Rollo v. Andes Ins. Co.*, 23 Gratt. (Va.) 509; *Averill v. Tucker*, 2 Cranch Cir. Ct. 544.

The rule has been applied not only to funds in the hands of a treasurer as above cited, but to a fund in the hands of a state auditor (*Mayor of Baltimore v. Root*, 8 Md. 95, *Devine v. Harvie*, 7 T. B. Mon. (Ky.) 439), a comptroller (*Waldman v. O'Donnell*, 57 How. (N. Y.) Pr. 215, *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 111) or agent for the payment of the salaries of the clerks in an executive department of the government (*Averill v. Tucker*, 2 Cranch Cir. Ct. 544), to overseers of the poor (*Overseers of Pittstown v. Overseers of Plattsburgh*, 18 Johns. (N. Y.) 407, 417), and other officers and agents.

Officer or agent must appear and answer.—Unlike the rule in regard to municipal corporations, *ante*, § 502, an officer or agent of such municipal corporation is bound to appear as a garnishee when he is by the writ so commanded to do. *Averill v. Tucker*, 2 Cranch Cir. Ct. 544.

made a garnishee so as to secure the application of such wages to the satisfaction of the teacher's debts.¹

The rule not only applies to officers of a municipal corporation, but to one who, as an agent thereof, has under his control a sum of money or personal property belonging to such corporation.² Neither can the officer or agent be charged personally as for a debt due to the corporation.³

It is believed that in states permitting a municipal corporation to be made a garnishee, a fund belonging to a municipal corporation in the hands of one of its officers may be reached by garnishment at the instance of a proper creditor.⁴

The general rules regarding the efficiency of garnishment in case of agents, trustees and officers in ordinary cases will be subsequently considered.⁵

§ 504. (e) Debtors of municipal corporations may be held, except for taxes.—Any person who is, in his individual capacity, indebted to a municipal corporation, may be made a garnishee at suit of a creditor of such corporation,⁶ except for an indebtedness arising on taxation. Taxes due to a municipal corporation are not subject to an execution or process of garnishment issued in behalf of a creditor of the corporation;⁷

1. *Bulkley v. Eckert*, 3 Pa. St. 638; *Millison v. Fisk*, 43 Ill. 112; *Bivens v. Harper*, 59 Ill. 21; *Trustees of Schools v. Tatman*, 13 Ill. 27; *Tracy v. Hornbuckle*, 8 Bush (Ky.) 336; *Spencer v. School District*, 11 R. I. 537. *Contra*, *Seymour v. Over River School District*, 53 Conn. 502.

2. *Merrell v. Campbell*, 49 Wis. 535.

3. *Dewey v. Garvey*, 130 Mass. 86; *Hodgson v. Dexter*, 1 Cranch Cir. Ct. 109; *Buckanan v. Alexander*, 4 How. 20; *Troy and Greenfield R. R. Co. v. Commonwealth*, 127 Mass. 43.

4. Compare, *ante*, § 500, and *Smoot v. Hart*, 33 Ala. 69, since, however, overruled by *Underhill v. Calhoun*, 63 Ala. 216.

In New Hampshire the agent of a town for the distribution of certain

money among the poor may be held as a garnishee. He is not a public officer within the rule; but the statute, it seems, treats such moneys as belonging to the inhabitants and not to the municipal corporation. *Wendell v. Pierce*, 13 N. H. 502; *Weeks v. Hill*, 38 N. H. 199.

5. *Post*, Chap. xxvi.

6. *Ocean Ins. Co. v. Portsmouth, etc., Railway Co.*, 3 Metc. (Mass.) 420; *Bray v. Wallingford*, 20 Conn. 416.

7. *Johnson v. Howard*, 41 Vt. 122; *Edgerton v. Third Municipality*, 1 La. Ann. 435; *Droz v. Parish of East Baton Rouge*, 36 La. Ann. 340; *Hibbard v. Clark*, 56 N. H. 155, 157; *Moore v. Mayor of Chattanooga*, 8 Heisk. (Tenn.) 850.

neither are they an indebtedness;¹ nor do they arise out of contract relations, express or implied.² A fund accruing to a corporation by taxation can not be reached by garnishment either while in the course of collection by suit or after such funds are in the city treasury. They can not be reached by a judgment creditor, even though he has given his note therefor and judgment has been recovered on the note.³

§ 505. **Not a public officer**—(a) **Generally.**—It is a rule of almost universal application that one who derives his authority from the law and who is obliged to execute it according to the rules of law, can not be held by process of garnishment, except so far as he is thereto expressly made liable by statute, that is to say: Any person deriving his authority to receive and hold money or property from the law and who is obliged to apply such money or property according to the rules of law, can not be held liable as a garnishee for such money or property while it is held by him under such authority.⁴ Consequently a public officer of any name or nature is beyond the reach of process of garnishment, while he holds the funds or property in his official and public capacity, and is accountable to the public or an individual merely as an officer.⁵ Money or property which has been obtained by an officer upon execution or other legal process, is in custody of the law and

1. *Hibbard v. Clark*, 56 N. H. 155, 157.

2. *Johnson v. Howard*, 41 Vt. 122.

3. *Underhill v. Calhoun*, 63 Ala. 216.

As to the garnishment of a fund voted for a railway, raised by taxation, which is in the hand of the county treasurer, see *Manning v. Matthews*, 70 Iowa 503; *McInerney v. Reed*, 23 Iowa 410; *First Nat. Bank of Canton v. Dubuque S. W. Ry. Co.*, 52 Iowa 378.

4. *Weaver v. Davis*, 47 Ill. 235; *Lightner v. Steinagel*, 33 Ill. 510; *Vierheller v. Brutto*, 6 Ill. App. 95; *Fanning v. First Nat. Bank*, 76 Ill. 53;

Waite v. Osborne, 11 Me. 185; *Burnham v. Beal*, 14 Allen (Mass.) 217; *Thayer v. Tyler*, 5 Allen (Mass.) 94; *Brooks v. Cook*, 8 Mass. 246; *Richards v. Griggs*, 16 Mo. 416; *Rollo v. Andes Ins. Co.*, 23 Gratt. (Va.) 509; *Stillman Isham*, 11 Conn. 124.

5. *Wallace v. Lawyer*, 54 Ind. 501; *Wilson v. Ridgely*, 46 Md. 235; *Thompson v. Brown*, 17 Pick. (Mass.) 462; *Chealy v. Brewer*, 7 Mass. 259; *Brooks v. Cook*, 8 Mass. 246; *Voorhees v. Sessions*, 34 Mich. 99; *Wendell v. Pierce*, 13 N. H. 502; *Stiles v. Davis*, 1 Black (U. S.) 101; *Conant v. Bicknell*, 1 D. Chipman (Vt.) 50.

can not be taken by another writ while it is held in *custodia legis*.¹ The rule is applied to money paid into court or held by a sheriff,² or deputy,³ to a United States marshal,⁴ a constable,⁵ a prothonotary,⁶ an ordinary,⁷ a clerk of court,⁸ a

1. *Zurcher v. Magee*, 2 Ala. 253; *Spalding v. Imlay*, 1 Root (Conn.) 551; *Sharp v. Clark*, 2 Mass. 91; *Wilder v. Bailey*, 3 Mass. 289; *Barnes v. Treat*, 7 Mass. 271, 274; *Pollard v. Ross*, 5 Mass. 319; *Whipple v. Thayer*, 16 Pick. (Mass.) 25; *Denny v. Willard*, 11 Pick. (Mass.) 519; *Fettyplace v. Dutch*, 13 Pick. (Mass.) 388; *Thompson v. Brown*, 17 Pick. (Mass.) 462; *Dubois v. Dubois*, 6 Cowen (N. Y.) 494; *Keating v. Spink*, 3 Ohio St. 105; *Bowden v. Schatzell*, *Bailey* (S. C.) Eq. 360; *Dickison v. Palmer*, 2 Rich. (S. C.) Eq. 407; *State*, for use of *Arnold v. Linaweaver*, 3 Head. (Tenn.) 51; *Pace v. Smith*, 57 Tex. 555; *Stiles v. Davis*, 1 Black (U. S.) 101; *The Oliver Jordan*, 2 Curtis (U. S.) 414; *Conant v. Bicknell*, 1 D. Chipman (Vt.) 50; *Prentiss v. Bliss*, 4 Vt. 513; *ante*, § 46.

Jailer's fees held by sheriff can not be reached while the sheriff is acting as the agent of the county or court or as *quasi* treasurer. *Webb v. McCauley*, 4 Bush (Ky.) 8.

2. *Clymer v. Willis*, 3 Cal. 363; *Geary v. Shepard*, 1 Root (Conn.) 544; *Zurcher v. Magee*, 2 Ala. 253; *Reddick v. Smith*, 4 Ill. 451; *Shepherd v. Bridenstine*, 80 Iowa 225; *First v. Miller*, 4 Bibb. (Ky.) 311; *Jones v. Jones*, 1 Bland (Md.) 443; *Lathrop v. Blake*, 23 N. H. 46; *Farmers' Bank v. Beaton*, 7 Gill & Johns. (Md.) 421; *Wilder v. Bailey*, 3 Mass. 289; *Pollard v. Ross*, 5 Mass. 319; *State v. Boothe*, 68 Mo. 546; *Marvin v. Hawley*, 9 Mo. 382; *Crane v. Freese*, 16 N. J. L. (1 Harr.) 305; *Hunt v. Stevens*, 3 Ired. (N. C.) 365; *Alston v.*

Clay, 2 Hayw. (N. C.) 171; *Dawson v. Holcomb*, 1 Ohio 275; *Fretz v. Heller*, 2 Watts & S. (Pa.) 397; *Blair v. Cantey*, 2 Spears L. (S. C.) 34; *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 111; *Pawley v. Gains*, 1 Overt. (Tenn.) 208; *Turner v. Fendall*, 1 Cranch. (U. S.) 117; *The Robert Fulton*, 1 Paine (U. S.) 620; *Conant v. Bicknell*, 1 D. Chipman (Vt.) 50; *Hill v. La Crosse*, etc., R. R. Co., 14 Wis. 291.

Redemption money.—Money received by a sheriff in his official capacity on the redemption of land which he has sold on execution, can not be reached by garnishment while it is held by him in his official capacity. *Lightner v. Steinagel*, 33 Ill. 510.

3. *Moore v. Graves*, 3 N. H. 408; *Stebbins v. Peeler*, 29 Vt. 289.

The rule does not apply as between a sheriff and his deputy, or as between deputies of the same sheriff in states where they are not considered separate officers. *Robinson v. Ensign*, 6 Gray. (Mass.) 300; *Sharp v. Clark*, 2 Mass. 91; *Vinton v. Bradford*, 13 Mass. 114; *Thompson v. Marsh et al.*, 14 Mass. 269. But where they are considered to be separate officers, the rule does not apply. *Walker v. Foxcroft*, 2 Me. 270; also, *ante*, § 385.

4. *Burrell v. Letson*, 1 Strobb. L. (S. C.) 239; *Blair v. Cantey*, 2 Spears L. (S. C.) 34; *Clarke v. Shaw*, 28 Fed. Rep. 356.

5. *Burleson v. Milan*, 56 Miss. 399.

6. *Ross v. Clarke*, 1 Dall. (U. S.) 354; *Stillman v. Isham*, 11 Conn. 124.

7. *Murrell v. Johnson*, 3 Hill (S. C.) 12.

8. *Lewis v. Dubose*, 29 Ala. 219;

register in chancery,¹ a master in chancery² or equity,³ a justice of the peace,⁴ a mayor,⁵ a chief of police,⁶ a commissioner of the District of Columbia,⁷ and a school director.⁸

A few states hold that money collected by a sheriff upon execution is then so far the property of the execution creditor that it may be reached by garnishee process.⁹ While others, by force of special statute, permit money held by an officer in his official capacity to be secured by garnishment.¹⁰ But the Alabama statute does not extend the rule to the salary or compensation of public officers in the hands of disbursing officers.¹¹

Falconer v. Head, 31 Ala. 513; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. Rep. 518; *Smith v. Finlen*, 23 Ill. App. 156; *Weaver v. Cressman*, 21 Neb. 675, 33 N. W. Rep. 478; *Gaither v. Ballew*, 4 Jones (N. C.) L. 488; *Alston v. Clay*, 2 Hayw. (N. C.) 171; *Overton v. Hill*, 1 Murph. (N. C.) 47; *Hunt v. Stevens*, 3 Ired. (N. C.) L. 365; *Drane v. McGavock*, 7 Humph. (Tenn.) 132; *Pace v. Smith*, 57 Tex. 555; *Sweetzer v. Clafin*, 74 Tex. 667; *Leroux v. Baldus*, (Tex.) 13 S. W. Rep. 1019; *Curtis v. Ford*, 78 Tex. 262, 14 S. W. Rep. 614.

1. *Voorhees v. Sessions*, 34 Mich. 99; *Langdon v. Lockett*, 6 Ala. 727.

2. *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. Rep. 518; *Weaver v. Davis*, 47 Ill. 235.

3. *Gaither v. Ballew*, 4 Jones (N. C.) L. 488.

4. *Clark v. Boggs*, 6 Ala. 809; *Burnham v. Beal*, 14 Allen (Mass.) 217; *Rockey v. Carson*, 4 Pa. Co. Ct. Rep. 543.

5. *City of Columbus v. Dunnick*, 41 Ohio St. 602.

6. *Connolly v. Thurber-Whyland Co.*, 91 Ga. 651, 18 S. E. Rep. 1004.

7. *Pottier & Stymus Manuf. Co. v. Taylor*, 3 MacArthur (D. C.) 4; *Brown v. Finley*, 3 MacArthur (D. C.) 77.

8. *Millison v. Fisk*, 43 Ill. 112, 118.

Further as to school directors and teachers, see "Municipal Corporations and Officers," *ante*, §§ 500-503.

9. *New Haven, etc., Co. v. Fowler*, 28 Conn. 103; *Jaquett v. Palmer*, 2 Harr. (Del.) 144; *Gray v. Maxwell*, 50 Ga. 108; *Woodbridge v. Morse*, 5 N. H. 519; *Wehle v. Conner*, 83 N. Y. 231; *Hurlburt v. Hicks*, 17 Vt. 193.

10. *Pruitt v. Armstrong*, 56 Ala. 306; *Williamson v. Harris*, 57 Ala. 40; *Patterson v. Pratt*, 19 Iowa 358; *Hoffman v. Wetherell*, 42 Iowa 89; *Storm v. Adams*, 56 Wis. 137; *Tyler v. Winslow*, 46 Me. 348.

11. *Pruitt v. Armstrong*, 56 Ala. 306. Money deposited with a sheriff by the defendant in replevin to enable him to retain the property is subject to garnishment, because it is said to be not in *custodia legis*. *Johnson v. Mason*, 16 Mo. App. 271. And money deposited with the clerk in lieu of an appeal bond may be garnished at suit of the depositor's creditor. The depositor's interest in such deposit is not contingent according to the rule. *Ante*, § 481. It remains his property subject to answer the demand of the plaintiff in the original suit. *Dunlop v. Patterson Fire Ins. Co.*, 74 N. Y. 145. Money in the hands of a sheriff

An officer of a foreign country (a foreign consul) is not privileged under the rule. He may be made a garnishee and service upon him as such will not be set aside on his privilege of being sued only in the United States courts.¹

§ 506. (b) **Liable when official duty ceases.**—While the officer is, by law, required to hold the property, he can not be deemed to be a debtor of the execution plaintiff or other person entitled to the fund or property.² When the purpose of the legal custody has been accomplished and the only duty of the officer is to pay the money to the principal defendant in garnishment, the officer may then be held as garnishee.³ And when the capacity in which the officer holds is changed from an official obligation to a personal liability, he may then be held liable by a process of garnishment.⁴

Money in the hands of a clerk of the court, which has been ordered to be paid, may be secured by process of garnishment served upon the clerk.⁵ A sheriff having a balance in his hands belonging to another after expiration of his office may be made liable as a garnishee of such person.⁶ Money paid into the hands of a clerk of court, when there has been no order of the court directing the same to be done, is not held by the clerk in his official capacity and is liable to be garnished.⁷

raised in pursuance of a decree of a court in chancery has been held liable to judgment in New Jersey. *Connover v. Ruckman*, 33 N. J. Eq. 303. Money paid into the clerk's office by order of court in a suit pending, may, on petition, be ordered to be applied to the satisfaction of the judgment in attachment, subject, however, to the equities of the parties to the original suit. *Trotter v. Lehigh Zinc & Iron Co.*, 41 N. J. Eq. 229, 3 Atl. Rep. 95, 11 Atl. Rep. 25.

1. *Kidderlin v. Meyer*, 2 Miles (Pa.) 242.

2. *Marvin v. Hawley*, 9 Mo. 382.

Until the return day of the execution the sheriff is not a debtor to the

plaintiff in execution and until then can not be held as garnishee. *Marvin v. Hawley*, 9 Mo. 382.

3. *Wilbur v. Flannery*, 60 Vt. 581.

4. *Lightner v. Steinagel*, 33 Ill. 510; *Weaver v. Davis*, 47 Ill. 235.

Upon the dissolution of an attachment the proceeds of a sale of the attached property are no longer in legal custody and the officer may be held as garnishee. *Evans v. Virgin*, 72 Wis. 423.

5. *Weaver v. Cressman*, 21 Neb. 675.

6. *Graham v. Endicott*, 7 Cal. 144; *Robertson v. Beall*, 10 Md. 125.

7. *Marine Nat. Bank v. Whiteman Paper Mills*, 49 Minn. 133, 51 N. W. Rep. 665.

Official duty ceases when the court directs the officer to pay over the fund. After the confirmation of a sale by a commissioner, and an order of distribution of the purchase money of the land sold, such commissioner may be held as garnishee,¹ provided the sale has been legal, but where it is invalid by having been made in an unauthorized manner, there has not been a statutory sale and garnishment will not prevail.²

§ 507. (c) **Liable for surplus retained.**—Any surplus remaining in the hands of a public officer who has raised a fund on execution, by sale, or otherwise, and has satisfied the demand for which the same was raised, may be garnished in the hands of such officer at suit of a creditor of the person to whom such surplus belongs,³ provided such person could recover the same in an action at law in his own name.⁴

§ 508. (d) **Liability for property of prisoner, when.**—While it has been often held that the property taken from a prisoner for safe keeping, by the officer arresting him, is in the custody of law and can not be reached by attachment,⁵ or garnishment,⁶ yet in Iowa and Alabama money or property so taken may be secured by a creditor of the prisoner by a process of garnishment served upon the officer.⁷ And likewise in all states which, by force of special statute, permit the garnishment of funds or property in the hands of the public officer.⁸

1. *Fearing v. Shafner*, 62 Miss. 791.

2. *Everett v. Herrin*, 48 Me. 537.

3. *King v. Moore*, 6 Ala. 160; *Langdon v. Lockett*, 6 Ala. 727; *Tuohey v. Inman*, 25 Ark. 604; *Jaquett v. Palmer*, 2 Harrington (Del.) 144; *Everett v. Herrin*, 48 Me. 537; *Lord v. Collins*, 79 Me. 227, 9 Atl. Rep. 611; *Watson v. Todd*, 5 Mass. 271, 274; *Fearing v. Shafner*, 62 Miss. 791; *Wheeler v. Smith*, 11 Barb. (N. Y.) 345; *Hill v. Beach*, 12 N. J. Eq. (1 Beas.) 31; *Orr v. McBryde*, 2 Carolina Law Repository 257; *Dickison v. Palmer*, 2 Rich.

(S. C.) Eq. 407; *Tucker v. Atkinson*, 1 Humph. (Tenn.) 300.

4. *Glass v. Doane*, 15 Ill. App. 66; *ante*, § 475.

5. *Langdon v. Lockett*, 6 Ala. 727; *Robinson v. Howard*, 7 Cush. (Mass.) 257; *Morris v. Penniman*, 14 Gray (Mass.) 220; *Sharp v. Clark*, 2 Mass. 91.

6. *Richardson v. Anderson*, (Tex. App.) 18 S. W. Rep. 195.

7. *Reifsnyder v. Lee*, 44 Iowa 101; *Ex parte Hurn*, 92 Ala. 102, 9 So. Rep. 515.

8. *Ante*, § 505.

§ 509. (e) **Liable for funds deposited in his own name, when.**—It has been said in Iowa that when a public officer deposits a fund in his individual name it amounts to a conversion by him, and the fund so deposited becomes his individual property and will be subject to garnishment sued out by a creditor of the clerk who has no knowledge that it is a public fund.¹ But in Illinois by force of special statute permitting “any person other than the defendant” to interplead, the officer may in such a case interplead on behalf of those for whom he holds the money in trust and prevent the application of the fund to the satisfaction of the demand of his individual creditor.²

§ 510. **Executors and administrators—(a) The old rule.**—In the absence of special statute it was an undisputed rule of law that an executor or administrator could not, in his official capacity, be held liable as a garnishee at suit of a creditor of the decedent, or of one who was a legatee or distributee, or other creditor of the estate.³ He is not then considered to be a “debtor.”⁴ Neither is he an agent, factor, attorney, or trustee of such creditor,⁵ because he derives his authority from the law and is obliged to execute it according to law.⁶ And it was said that to subject executors and administrators to the process

1. *Long v. Emsley*, 57 Iowa 11.

2. *Meadowcroft v. Agnew*, 89 Ill. 469. See further, *post*, § 672.

3. *Tillinghast v. Johnson*, 5 Ala. 514; *Thorn v. Woodruff*, 5 Ark. 55; *Sime's Estate*, *Myrick's Probate Reports*, (Cal.) 100; *Stanton v. Holmes*, 4 Day (Conn.) 87; *Winchell v. Allen*, 1 Conn. 385; *Stillman v. Isham*, 11 Conn. 124; *State v. Huxley*, 4 Harr. (Del.) 343; *Post v. Love*, 19 Fla. 634; *Roth v. Hotard*, 32 La. Ann. 280; *Thornhill v. Christmas*, 11 Rob. (La.) 201; *Waite v. Osborne*, 11 Me. 185; *Stills v. Harmon*, 7 Cush. (Mass.) 406; *Curling v. Hyde*, 10 Mo. 374; *Norton v. Clark*, 18 Nev. 247; *Beckwith v. Baxter*, 3 N.

H. 67; *Elliott v. Newby*, 12 N. C. 22; *Gee v. Warwick*, 2 Hayw. (N. C.) 354; *Welch v. Gurley*, 2 Hayw. (N. C.) 334; *Ryon v. Marey*, 1 Luzerne Legal Register 360; *Barnett v. Weaver*, 2 Whart. (Pa.) 418; *Bryant v. Fussel*, 11 R. I. 286; *Young v. Young*, 2 Hill S. C. Law, 425; *Gorman v. Swaggerty*, 4 Sneed (Tenn.) 560; *Whitehead v. Coleman*, 31 Gratt. (Va.) 784; *Bickle v. Chrisman*, 76 Va. 678.

4. *Parker v. Donnally*, 4 W. Va. 648; *Winchell v. Allen*, 1 Conn. 385; *Conway v. Armington*, 11 R. I. 116.

5. *Conway v. Armington*, 11 R. I. 116.

6. *Picquet v. Swan*, 4 Mason 443.

of garnishment might destroy the whole operation and intention of our law of administrators.¹

§ 511. (b) **The new rule.**—Notwithstanding such well established old rule of law, executors and administrators are, by force of special statute in a great number of states, deemed to be amenable to process of garnishment to subject property held by them in their fiduciary capacity, either by a creditor of the decedent or by a creditor of a legatee or distributee.²

1. *Thorn v. Woodruff*, 5 Ark. 55.

2. *Sapp v. McArdle*, 41 Ga. 628; *Morgan v. McLaren*, 4 Greene (Iowa) 536; *Shepherd v. Bridenstine*, 80 Iowa 225, 45 N. W. Rep. 746; *Cummings v. Garvin*, 65 Me. 301; *Wadleigh v. Jordan*, 74 Me. 483; *Hardesty v. Campbell*, 29 Md. 533; *Wheeler v. Bowen*, 20 Pick. (Mass.) 563, 564; *Holbrook v. Waters*, 19 Pick. (Mass.) 354, 355; *Boston Bank v. Minot*, 3 Metc. (Mass.) 507; *Strong v. Smith*, 1 Metc. (Mass.) 476; *Hoar v. Marshall*, 2 Gray (Mass.) 251; *Henshaw v. Whitney*, 11 Gray (Mass.) 223; *Cady v. Comey*, 10 Metc. (Mass.) 459; *Vantine v. Morse*, 104 Mass. 275; *Nickerson v. Chase*, 122 Mass. 296; *Mechanics' Sav. Bank v. Waite*, 150 Mass. 234, 22 N. E. Rep. 915; *Harmon v. Osgood*, 151 Mass. 501; *Beverstock v. Brown*, 157 Mass. 565, 32 N. E. Rep. 901; *Holman v. Fisher*, 49 Miss. 472; *Adams v. Barrett*, 2 N. H. 374; *Piper v. Piper*, 2 N. H. 439; *Quigg v. Kittredge*, 18 N. H. 137; *Palmer v. Noyes*, 45 N. H. 174; *Chase v. Currier*, 63 N. H. 90; *Woodward v. Woodward*, 9 N. J. L. 115; *Baldy v. Brady*, 15 Pa. St. 103; *Gochenaur v. Hostetter*, 18 Pa. St. 414; *Mathews v. Park*, 1 Pitts. (Pa.) 22; *Strong's Ex'rs v. Bass*, 35 Pa. St. 333; *Lorenz v. King*, 38 Pa. St. 93; *Beck's Estate*, 133 Pa. St. 51; *Strouse v. Lawrence*, (Pa. Com. Pl.) 13 Pa. Co. Ct. R. 131; *Prentice v. Pleasonton*, (Pa.) 8 Atl. Rep. 842;

Messinger v. Mantz, (Pa.) 13 Atl. Rep. 197; *Sandidge v. Graves*, 11 Pat. & H. (Va.) 101.

After giving bond.—In Massachusetts an administrator can not be made a garnishee before he has filed his official bond and had the same approved. *Davis v. Davis*, 2 Cush. (Mass.) 111. But his right to the property attaches the moment his bond is approved and he may then be charged as garnishee by service of process of garnishment accordingly. *Mechanics' Sav. Bank v. Waite*, 150 Mass. 234, 22 N. E. Rep. 915.

In Virginia a legacy may be attached in the hands of an executor before he qualifies. *Sandidge v. Graves*, 1 Pat. & H. (Va.) 101.

Set-off.—If the legatee be indebted to the estate of the testator the executor has the same right to set off such indebtedness against the attaching creditor as he would have against the legatee. *Strong v. Bass*, 35 Pa. St. 333; *Nickerson v. Chase*, 122 Mass. 296; *ante*, § 471.

The administrator may set off, when summoned as garnishee, an individual indebtedness of the distributee to him when the same exceeds the amount of the distributive share. *Henshaw v. Whitney*, 11 Gray (Mass.) 223.

But not when the debt due him is barred by the statute of limitations. *Wadleigh v. Jordan*, 74 Me. 483. But

The effect of this new rule is to cause the process of garnishment to operate as a species of compulsory statutory assignment by which a creditor may obtain, by the operation of law, that which his debtor might voluntarily assign to him in payment of his debt.¹

In states permitting an executor or administrator to be made a garnishee, he may be held as such whenever the person to whom he is to pay the legacy or distributive share, may maintain an action at law against such executor or administrator.² After a court has decreed a distribution of the proceeds in the hands of the administrator, such administrator may be held as garnishee.³

Some statutes permit an executor or administrator to be made

an administrator, when summoned as such by garnishment, can not set off a demand which he has in his individual right against the plaintiff in garnishment. *Lorenz v. King*, 38 Pa. St. 93.

1. *Strong v. Smith*, 1 Metc. (Mass.) 476. It seems also that the London custom, from which our law of garnishment was modeled, *ante*, §§ 1 and 465, permitted executors and administrators to be made garnishees. *Privilegia Londini* 267; *Zoller on Executors*, 4th Am. Ed. 478.

2. *Cutter v. Perkins*, 47 Me. 557; *Post v. Love*, 19 Fla. 634; *Piper v. Piper*, 2 N. H. 439.

3. *Nerac's Estate*, 35 Cal. 392; *Fitchett v. Dolbee*, 3 Harr. (Del.) 267; *Richards v. Griggs*, 16 Mo. 416; *Adams v. Barrett*, 2 N. H. 374; *Norton v. Clark*, 18 Nev. 247; *Harrington v. La Rocque*, 13 Ore. 344; *J. I. Case Threshing Machine Co. v. Miracle*, 54 Wis. 295; *Hoyt v. Christie*, 51 Vt. 48; *Short v. Moore*, 10 Vt. 446.

In Illinois he can not be held until an ordinary suit would lie against him brought by the principal debtor. *Bartell v. Bauman*, 12 Ill. App. 450;

Crownover v. Bamburg, 2 Ill. App. 162.

And in Missouri the administrator can be held as garnishee after judgment is rendered against him when the suit is begun against the person in whose favor judgment was rendered. *Richards v. Griggs*, 16 Mo. 416.

Liabie personally for effects of the estate. — When an estate has been settled, the funds thereof in the hands of the administrator may be secured by garnishment process against him, summoning him personally and not in his representative capacity at suit of a creditor of one entitled to a share in the proceeds. *Hoyt v. Christie*, 51 Vt. 48. And a judgment against him personally may be held by process of garnishment sued out against him in his official capacity. *Dudley v. Falkner*, 49 Ala. 148.

It has been said that money collected for an executor is attachable in a suit against him personally, although the same be collected on a note naming him as executor. *Coburn v. Ansart*, 3 Mass. 319. But it was also held that goods in the hands of an executor can not be seized in execution on a

a garnishee during the pendency of the settlement of the estate,¹ but no judgment can be rendered against him until a settlement is made, unless he assent to the legacy or admits assets to pay the amount claimed out of the distributive share.² Until the distributive shares are ascertained they can not be secured by garnishment. In other words, when it is uncertain whether the administrator will have a surplus in his hands or not he can not be held as garnishee.³ An executor can not be compelled by garnishment in an action against one heir or legatee to pay an undivided portion when the debts and other legacies are unpaid.⁴

judgment against him personally. *Farr v. Newman*, 4 Term Rep. 621.

1. *Boyer v. Hawkins*, 86 Iowa 40, 52 N. W. Rep. 659; *Carson v. Carson*, 6 Allen (Mass.) 397; *Sinnickson v. Painter*, 32 Pa. St. 384; *Lorenz v. King*, 38 Pa. St. 93.

2. *Moore v. Stainton*, 22 Ala. 831.

3. *Beverstock v. Brown*, 157 Mass. 565, 32 N. E. Rep. 901; *Palmer v. Noyes*, 45 N. H. 174; *McCreary v. Topper*, 10 Pa. St. 419. But see *Stratton v. Ham*, 8 Ind. 84.

4. *Deblieux v. Hotard*, 31 La. Ann. 194; *Rich v. Waters*, 22 Pick. (Mass.) 563; *Nickerson v. Chase*, 122 Mass. 296.

The answer of the garnishee that he holds property of the decedent of whom the principal defendant is a legatee, but that he can not say that he is indebted to the defendant or not, will not authorize a judgment against him. *Bridges v. North*, 22 Ga. 52.

Condition precedent.—A condition precedent to be performed by the executor will prevent the application by garnishment of a fund in his hands. In this case the executor was directed to sell land after the death of a widow and distribute the proceeds among certain children. He could not be held by garnishment before the

death of the widow. *Hess v. Shorb*, 7 Pa. St. 231.

Active trust.—An executor was directed and empowered to sell all of decedent's land and to pay over the rents from the time of his death until the time of such sale to persons designated, after deducting the charges thereon. It was held that this constituted an active trust within the meaning of the New Jersey statute regarding exemptions and that the fund could not be reached by garnishment. *Force v. Brown*, 32 N. J. Eq. 118.

Annuities.—Where an executor is directed to pay certain annuities out of an estate he can not, before such annuity becomes due, be held by garnishment process at suit of an annuitant's creditor. *Cany v. Day*, 2 Miles (Pa.) 412; *Carson v. Carson*, 6 Allen (Mass.) 397. But when such annuity or interest thereon becomes due, it belongs to the beneficiary absolutely and may be subject to garnishment. *Gruver v. Edinger*, (Pa. Com. Pl.) 13 Pa. Co. Ct. Rep. 307. And where the estate is solvent an annuity which has become due and payable may be reached in the hands of the executor by garnishment,—*Rhodes v. Kemble*, (Pa. Com. Pl.) 12 Pa. Co. Ct. Rep.

Garnishee's administrator.—Where a garnishee dies before making the disclosure and before default has been entered against him, his administrator can not be compelled to answer the garnishment.¹

§ 512. (c) **Representative must be summoned as such.**—In order that an executor or administrator may be charged as a garnishee in his representative capacity, it is absolutely necessary that the process be directed to and served upon him as such representative, and also that his answer show an indebtedness from him in his representative capacity to the plaintiff in garnishment. It is not enough that the answer show an indebtedness of the decedent remaining unsatisfied.²

§ 513. **Guardians.**—A guardian appointed by a court is a public officer in the same sense that an executor or administrator is a public officer, and will be generally governed by the same rules in proceedings by garnishment. In the absence of special provision of statute he is considered an officer of the law and held to be beyond the reach of garnishment proceedings. Even in states which, by special statute, permit an executor or administrator to be held as garnishee, a guardian can not be so held where he is not especially named in the statute,³ even though the statute may authorize an execution

470—in all states permitting executors to be held as garnishees.

1. *White v. Ledyard*, 48 Mich. 264; *Tate v. Moorehead*, 65 N. C. 681.

2. *Tillinghast v. Johnson*, 5 Ala. 514. Further see *post*, § 532.

Service upon all.—In Alabama it was held that service of summons of garnishment upon one of two executors was not enough to hold both. *Terry v. Lindsey*, 3 Stew. & Port. (Ala.) 317.

Previous demand.—Where an executor or administrator is permitted to be held as garnishee it is said that the same may be done without previous demand or presentation of the claim

by the principal debtor. *Quigg v. Kittredge*, 18 N. H. 137.

Can not confess judgment—Effect of default.—It has been very justly held in Virginia that a garnishee can neither, by silence or direct confession, authorize a judgment against himself *de bonis testatoris*, and that even if he thereby precludes himself from interposing a defense he does not preclude those whom he represents from filing an interpleader for the purpose of having their rights established. *Bickle v. Chrisman*, 76 Va. 678. As to “Interpleader,” see *post*, § —.

3. *Perry v. Thornton*, 7 R. I. 15;

against such guardian.¹ In a state permitting a guardian to be held as a garnishee for the debt of his ward he can not be adjudged liable until he is found to be indebted to the ward, or until his accounts have been adjusted in the probate court and the balance found in his hands.²

§ 514. **Other officers and representative persons.**—There are many other officers and agents whose duties are more or less public in their nature, and yet their duties are so much dependent upon their private contract relations that it is thought best to consider them in the next two succeeding chapters, in which the “Efficiency of Garnishment” will be considered in the various cases where the liability of the garnishee depends largely on the condition of his contract with his employer or creditor.³

Hanson *v.* Butler, 48 Me. 81; Godbold *v.* Bass, 12 Rich. L. (S. C.) 202; Vierheller *v.* Brutto, 6 Ill. App. 95.

1. Smith *v.* Jackson, 56 Ala. 25.

2. Davis *v.* Drew, 6 N. H. 399.

And he can not, of course, be held as a guardian after his guardianship

is revoked, although he may have been adjudged liable to pay certain necessary expenses of the ward.

Woods *v.* Milford, etc., Sav. Inst., 58 N. H. 184.

3. See *post*, §§ 515, 548.

CHAPTER XXV.

EFFICIENCY OF GARNISHMENT.

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| <p>§ 515. In case of sole indebtedness.</p> <p>516. (a) Determined by contract relation between garnishee and principal debtor.</p> <p>517. (b) Contract must be legal.</p> <p>518. In case of partnerships.</p> <p>519. (a) Generally.</p> <p>519. (b) On a demand against an individual member.</p> <p>520. (c) Indebtedness to a firm has priority over indebtedness to a member.</p> <p>521. (d) Insolvency of firm defeats attachment of a partner's interest.</p> <p>522. (e) When a partner may be a garnishee in an action against the firm.</p> <p>523. (f) A debtor of a member may be a garnishee in an action against the firm.</p> <p>524. In case of joint debtors.</p> <p>525. (a) When owing jointly must be jointly charged.</p> <p>525. (b) When not owing jointly must not be jointly charged.</p> <p>526. (c) The writ should describe them as "jointly" liable.</p> <p>527. (d) The writ must issue in an action against the identical persons to whom the garnishees are indebted.</p> | <p>§ 528. (e) Effect of death of joint debtor.</p> <p>529. In case of marriage.</p> <p>530. In case of infancy.</p> <p>531. When effects held in trust.</p> <p>532. (a) Generally.</p> <p>532. (b) Executors and administrators as trustees.</p> <p>533. (c) Trustee charged with support of an individual.</p> <p>534. When effects have been assigned.</p> <p>535. (a) No longer the property of the assignor.</p> <p>535. (b) Can not be secured to satisfy his debt.</p> <p>536. (c) Assignee's equitable interest will be protected from garnishment.</p> <p>537. (d) Same—Assigned choses in action can not be reached by assignor's creditors.</p> <p>538. (e) Assignment binds garnishment though he have no notice till after service of process.</p> <p>539. (f) Notice prior to judgment necessary.</p> <p>540. (g) Any notice sufficient before service of garnishment.</p> <p>541. (h) Answer must show assignment.</p> <p>542. (i) Assignees for benefit of creditors can not be made garnishees.</p> |
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- § 543. (j) Assignment made in another state. § 546. (m) Garnishment efficient when assignment fraudulent.
544. (k) Assent of creditor — Necessity and effect thereof. 547. When effects held by a receiver.
545. (l) Garnishment will reach surplus only.

§ 515. In case of sole indebtedness.—Garnishment is a strictly legal proceeding.¹ It is simulated to an attachment of personal property and in its nature and operation is the institution of a suit by a creditor against the debtor of his debtor.² Therefore a plaintiff can never make a garnishment proceeding efficacious unless there is an actual indebtedness owing from the contemplated garnishee to the principal debtor,³ or unless the contemplated garnishee have legal control of the fund of the principal debtor,⁴ or have control of property of such debtor within the jurisdiction of the court.⁵ The word

1. *Ante*, §§ 475-482.

2. *Harris v. Miller*, 71 Ala. 26.

3. *Furness v. Smith*, 30 Pa. St. 520; *Mitchell v. Byrne*, 6 Rich. L. (S. C.) 171; *Corey v. Powers* 18 Vt. 587; *Carson v. Allen*, 2 Chandler (Wis.) 123, 2 Pinney (Wis.) 457; *Edwards v. Roepke*, 74 Wis. 571; *Louisville & Nashville R. R. Co. v. Dooley*, 78 Ala. 524.

In general the indebtedness must be payable within the state, *ante*, § 490, but in Alabama and Minnesota it seems to be immaterial that the debt is payable in another state. *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405, 52 N. W. Rep. 905; *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. Rep. 134.

A gift not an indebtedness.—One who has received a gratuitous gift of money can not be charged as a garnishee in an action against the giver, although the debt sued for existed prior to the gift, if the case does not disclose the fact that the giver was insolvent or largely indebted. *Whittier v. Prescott*, 48 Me. 367.

4. *Buddig v. Simpson*, 33 La. Ann. 375.

5. *Wheat v. Platte City & F. D. R. R. Co.*, 4 Kan. 370; *Wolf v. Tappan*, 5 Dana (Ky.) 361; *Buddig v. Simpson*, 33 La. Ann. 375; *Lawrence v. Smith*, 45 N. H. 533; *Stickney v. Batchelder*, 18 N. H. 40; *Swann v. Summers*, 19 W. Va. 115; *Godfrey v. Macomber*, 128 Mass. 188; *Smith v. Davis*, 1 Wis. 447; *Winstanley v. Savage*, 2 McCord (S. C.) Ch. 435.

Time of indebtedness.—In most states there must, in fact, be an actual existing indebtedness at the time of the service of the writ. In some of them the debt must be actually due; but in others it is sufficient if the indebtedness be existing at the time of service and due when judgment is rendered. *Branch Bank v. Poe*, 1 Ala. 396; *Hazard v. Franklin*, 2 Ala. 349; *Michigan C. Ry. Co. v. Chicago & M. L. S. Ry. Co.*, 1 Ill. App. 399; *Johnson v. Lamping*, 34 Cal. 293; *Maduel v. Mousseaux*, 29 La. Ann. 228; *Glenn*

"control," as used in the law of garnishment, does not mean the mere physical power to *take* possession of it and carry it off, but the immediate possession of it, *i. e.*, the present and immediate rightful custody of it, including the right to retain that possession and to maintain custody and control. Therefore, although the property be in a sense under the control of the garnishee, and yet situate outside of the jurisdiction of the court, garnishment proceedings will not be efficient as to it.¹ The proceeding by garnishment does not create a lien upon the fund or property within the hands or under the control of the garnishee, but effects a personal liability against the garnishee to appear and defend² according to the rules hereinafter set forth.³ There being no lien the garnishee, having control of personal property, may sell and convert the same to his own

v. Boston, etc., Glass Co., 7 Md. 287; *Mace v. Heald*, 36 Me. 136; *Nicholson v. Crook*, 56 Md. 55; *Shepard v. Turner*, 13 Allen (Mass.) 92; *Boston Bank v. Minot*, 3 Metc. (Mass.) 507; *Getchell v. Chase*, 124 Mass. 366; *Wart v. Mann*, 124 Mass. 586; *Galloway v. Holmes*, 1 Dougl. (Mich.) 330; *Martz v. Detroit Ins. Co.*, 28 Mich. 201; *Zimmer v. Davis*, 35 Mich. 39; *Thorp v. Preston*, 42 Mich. 511; *Hitchcock v. Miller*, 48 Mich. 603; *Hopson v. Dinan*, 48 Mich. 612; *Bethel v. Chipman*, 57 Mich. 379; *Nash v. Gale*, 2 Minn. 310; *Chase v. North*, 4 Minn. 381; *Cole v. Sater*, 5 Minn. 468; *Fearing v. Shafner*, 62 Miss. 791; *Oppenheimer v. Marr*, 31 Neb. 811, 48 N. W. Rep. 818; *Carty v. Fenstemaker*, 14 Ohio St. 457.

While in a few states only is the garnishee held liable for money or other chattels which is received by him after the service of the writ. *Sheetz v. Hobensack*, 20 Pa. St. 412; *Silverwood v. Bellas*, 8 Watts (Pa.) 420; *Hays v. Lycoming Fire Ins. Co.*, 99 Pa. St. 621; *Seymour v. Cooper*, 25 Vt. 141.

Continuance till maturity of debt.—

Under one statute permitting an indebtedness which falls due in the future to be secured by garnishment, it was held that the court would continue the case till the maturity of the debt or render judgment with stay of execution. *Dunnegan v. Byers*, 17 Ark. 492.

1. *First Nat. Bank v. Davenport, etc., Ry. Co.*, 45 Iowa 120; *Smalley v. Miller*, 71 Iowa 90; *Montrose P. Co. v. Dodson & H. M. Co.*, 76 Iowa 172.

Even a promissory note which is in another state and under the control of the garnishee can not be reached by garnishment although the garnishee himself be within the jurisdiction of the court. *Bowen v. Pope*, 26 Ill. App. 233. See further as to "Promissory notes and choses in action," *post*, §§ 562-576.

Money deposited in bank is, however, sufficiently within the custody of the depositor to enable him to be held as garnishee. *Glenn v. Boston & S. Glass Co.*, 7 Md. 287. Further see *post*, § 579.

2. *Moor v. Walker*, 46 Iowa 164; *Parker v. Farr*, 2 Browne (Pa.) 331; *ante*, §§ 471-474.

3. *Post*, § 617, *et seq.*

use,¹ but the personal liability against him will continue² and will not be lessened by the fact that after service of process upon him, he voluntarily pays over the fund to the defendant.³ He can not surrender notes to his creditor for the indebtedness and thereby release himself of liability to the plaintiff.⁴ He can not make a new contract,⁵ nor can he rescind his old contract with the principal debtor so as to escape liability under the garnishment.⁶ But when he is forced to part with the money or property by other compulsory legal process he will thereby be relieved from liability to the plaintiff in garnishment.⁷

"Any person" being indebted or having the goods, effects, or credits of a debtor in his hands may, generally, be made a garnishee by provision of the statute.⁸ This will, in some states, permit a creditor to garnish a fund in his own hands when it belongs to his debtor.⁹ While in other states the term

1. Unless by statute he is expressly required to retain possession of it. *Randolph v. Heaslip*, 11 Iowa 37.

2. *Moor v. Walker*, 46 Iowa 164.

3. *West v. Platt*, 116 Mass. 308; *Turbill's case*, 1 Saunders (Eng.) 67; *Hughes v. Monty*, 24 Iowa 499; *Cleneay v. Junction R. R. Co.*, 26 Ind. 375; *Stetson v. Cleneay*, 14 Ind. 453.

He can not even pay attorney's fees in defense of the suit. *Adams v. Penzell*, 40 Ark. 531.

Payment in good faith after legal service had been made upon him without his knowledge, was once held to discharge his liability to the plaintiff. *Landry v. Chayret*, 58 N. H. 89. Compare, *Robinson v. Hall*, 3 Metc. (Mass.) 301; *Williams v. Marston*, 3 Pick. (Mass.) 65; *Wood v. Bodwell*, 12 Pick. (Mass.) 268.

4. *Stevens v. Dillman*, 86 Ill. 233; *Brunswick Bank v. Sewall*, 34 Me. 202;

5. *Phelps v. Atchison*, Topeka, etc., R. R. Co., 28 Kan. 165.

6. *Fowler v. Williamson*, 52 Ala. 16.

But the non-payment of money to his creditor, the principal defendant, during the pendency of proceedings in garnishment, is not a breach of his contract to pay the money. *Ersine v. Erskine*, 13 N. H. 436; but as to his liability for interest during the pendency of the suit, see *post*, § 689.

7. *Hooper v. Benson*, 1 Root (Conn.) 545; *Parker v. Kinsman*, 8 Mass. 486; *Burlingame v. Bell*, 16 Mass. 318; *Clapp v. Rogers*, 38 N. H. 435; *Godard v. Hapgood*, 25 Vt. 351; *Wilder v. Weatherhead*, 32 Vt. 765.

8. *Central Plank Road Co. v. Sammons*, 27 Ala. 380; *Pettingill v. Androscoggin R. R. Co.*, 51 Me. 370; *Chase v. Haughton*, 16 Vt. 594.

9. *Arlidge v. White*, 1 Head. (Tenn.) 241; *Boyd v. Bayless*, 4 Humph. (Tenn.) 386; *Richardson v. Gurney*, 9 La. 285; *Norton v. Norton*, 43 Ohio St. 509; *Dudley v. Falkner*, 49 Ala. 148, 152; *Grayson v. Veeche*, 12 Martin (La.) 688.

“any person” is held not to include the plaintiff who institutes the proceeding.¹

§ 516. (a) **Determined by contract relation between garnishee and principal debtor.**—Whether or not a process of garnishment will be effective to secure the appropriation of the money or property in the hands of the garnishee depends wholly upon the contract relation existing between the garnishee and the principal debtor. If the principal debtor himself could, in an action at law,² recover the money or property from the person contemplated as the garnishee then the same may be secured by garnishment. A plaintiff by garnishment can not place himself in a superior position as regards a recovery than is occupied by the principal defendant.³ The garnishee’s liability is measured by his responsibility and relation to the defendant. He can be charged only in consistency with the subject of his contract with the defendant. And if by any pre-existing *bona fide* contract his accountability has been removed or modified, it follows that the garnishee’s liability is correspondingly effected, for the garnishment can not change the nature of the contract between the garnishee and the defendant, nor prevent the garnishee from performing his contract with third persons.⁴ Where the debt has been

1. *Beach v. Fairbanks*, 52 Conn. Md. 163; *Head v. Richardson*, 16 N. 167; *Hoag v. Hoag*, 55 N. H. 172; H. 454; *Jewett v. Bacon*, 6 Mass. 60. *Belknap v. Gibbens*, 13 Metc. (Mass.) 471; *Knight v. Clyde*, 12 R. I. 119.

2. *Ante*, §§ 475–482 and 515.

3. *Teague v. La Grand*, 85 Ala. 493; *Patton v. Smith*, 7 Ired. (N. C.) L. 438; *Fitzgerald v. Hollingsworth*, 14 Neb. 188.

Unless by fraud or otherwise the principal defendant is estopped from collecting his demand from the person to be made a garnishee.

4. *Williams v. Housel*, 2 Iowa 154; *Baltimore, etc., R. R. Co. v. Wheeler*, 18 Md. 372; *Troxall v. Applegarth*, 24

Where the garnishee is bound to deliver merchandise at a particular time and place, and by default of his creditor he becomes discharged from such contract, he is also discharged from his liability as garnishee. *Jewett v. Bacon*, 6 Mass. 60.

Subsequent contract has no effect.—

The liability of the garnishee is fixed by the service of process upon him, therefore any new contract which he makes with his creditor will have no effect upon his liability to the plaintiff in garnishment. *Biggs v. Kouns*, 7 Dana (Ky.) 405.

paid or the contract fulfilled, the garnishee can not be held liable, for he can not be held twice liable.¹

Where the contract has not been fulfilled and where the performance thereof or the payment of the debt depends upon some condition precedent, the happening of which is uncertain and contingent, the garnishee can not be held liable to the plaintiff in garnishment, because the principal defendant could not in such a case hold his debtor, the garnishee, liable in an action at law.² There is no liability until the conditions

1. *Wallace v. Maroney*, 6 Mackey (D. C.) 221; *Mims v. West*, 38 Ga. 18; *Ray v. Faulkner*, 73 Ill. 469; *Huntington v. Risdon*, 43 Iowa 517; *Guttrue v. Langton*, 3 Har. & M. (Md.) 178; *Lieberman v. Hoffman*, 102 Pa. St. 590.

Where a garnishee paid his creditor before he had knowledge of the service of process he was not held liable as a garnishee, although he suspected at the time of payment that his creditor demanded it because he feared garnishment proceedings might be instituted. *Robinson v. Hall*, 3 Metc. (Mass.) 301; *Williams v. Marston*, 3 Pick. (Mass.) 65; *Wood v. Bodwell*, 12 Pick. (Mass.) 268.

2. *Williams v. Androscoggin R. R. Co.*, 36 Me. 201; *Davis v. Davis*, 49 Me. 282; *Larrabee v. Walker*, 71 Me. 441; *Webber v. Bolte*, 51 Mich. 113; *Kiely v. Bertrand*, 67 Mich. 332, 34 N. W. Rep. 674; *Rice v. Third Nat. Bank*, 97 Mich. 414, 56 N. W. Rep. 776; *Durling v. Peck*, 41 Minn. 317, 43 N. W. Rep. 65; *Reinhart v. Hardesty*, 17 Nev. 141, 30 Pac. Rep. 694.

What is not a contingency.—A debt which is certain as to liability and yet uncertain as to amount, has been held not to be a contingency. *Downer v. Topliff*, 19 Vt. 399.

What is a contingency.—A promise to deliver certain articles or quantities of an article at a future day at a

certain price, is contingent and creates no liability that can be secured by garnishment. *Jones v. Crews*, 64 Ala. 368.

When rent contingent.—Rent which is not actually due at the time the liability fixes by the service of process of garnishment can not be thereby secured. *Blankenship & Blake Co. v. Moore*, (Tex.) 16 S. W. Rep. 780; *Thorp v. Preston*, 42 Mich. 511. But where the liability for the future rent is absolute and not contingent, it may be reached by garnishment. *Rowell v. Felker*, 54 Vt. 526.

When board contingent.—One who contracts to pay his board by the week is only indebted to his landlord before the close of the week (if at all) for the part of the week which has expired and can only be held liable for so much in garnishment at suit of his landlord's creditor. *Singer v. Townsend*, 53 Wis. 126.

Where an inn-keeper requires his guest to pay in advance or pledge payment for his keeping, no indebtedness arises that will render such guest liable in garnishment by the inn-keeper's creditor. *Caldwell v. Stewart*, 30 Iowa 379.

When insurance contingent.—An insurance company can not be garnished for a loss under a policy until all conditions precedent to the right of the insured to maintain an action have

have been fulfilled.¹ And in states where the liability of the garnishee is fixed by the service of the process and where it does not include the liability accruing thereafter, the changing of a contingency into an absolute indebtedness after the service and before the judgment will not render the garnishee liable.²

When a garnishee has contracted with the principal debtor that he will pay the money or deliver the property to some third person, then the plaintiff in garnishment can not recover, because he is only placed by the garnishment in the position of the principal defendant, who could not himself recover from the person made the garnishee.³ Furthermore, where the principal debtor has acquired his demand against the garnishee by the assignment of a claim which is not negotiable, the garnishee will not be liable to the plaintiff unless he has promised to pay the principal debtor or recognized him as his creditor.⁴

§ 517. (b) **Contract must be legal.**—The contract which exists between the principal debtor and the contemplated garnishee must be a legal contract, or garnishment proceedings will be unavailing; therefore money coming wrongfully into the hands of the garnishee—as the consideration of real estate

been fulfilled. *Katz v. Sorsby*, 34 La. Ann. 588; *Nickerson v. Nickerson*, 80 Me. 100; *Gies v. Bechtner*, 12 Minn. 279; *Girard Fire Ins. Co. v. Field*, 45 Pa. St. 129. A life insurance company can not be held as a garnishee until the insured is dead. *Day v. New England Life Ins. Co.*, 111 Pa. St. 507, s. c. 56 Am. Rep. 297.

Options.—An option not yet exercised is a condition precedent preventing liability by process of garnishment. *Carter v. Webster*, 65 N. H. 17, 17 Atl. Rep. 978. And an option of an insurance company to pay the loss or rebuild, on which the company elects to rebuild, avoids a liability in garnishment because there is then no action at law for the money. *Hurst*

v. Home Protection Fire Ins. Co., 81 Ala. 174, 1 So. Rep. 209. Further as to contingency, see *ante*, § 481.

1. *Williams v. Young*, 46 Iowa 140.

2. *Williams v. Androscoggin R. R. Co.*, 36 Me. 201.

3. *Lovely v. Caldwell*, 4 Ala. 684; *Coleman v. Hatcher*, 77 Ala. 217; *Merchants' and Mechanics' Bank v. Coleman*, 81 Ala. 170; *Starr v. Carrington*, 3 Conn. 278; *Dibble v. Gaston*, R. M. Charl. (Ga.) 444; *Hueskamp v. Van Leuven*, 56 Iowa 653; *Baker v. Eglin*, 11 Ore. 333; *Claffin v. Kimball*, 52 Vt. 6.

4. *Folsom v. Haskell*, 11 Cush. (Mass.) 470. Further as to "Efficiency in cases of assignment," see *post*, §§ 534-546.

supposed to be conveyed to him by another to which no title has passed—can not be reached by process of garnishment sued out by a creditor of the supposed grantor.¹ Likewise where the sale of intoxicating liquors is unlawful, money due on such a sale can not be reached by garnishment.² Furthermore, it is held that one who has paid usury can not be held as a garnishee for the amount he is entitled to recover.³ Neither can one who has received usury, in Vermont, be held as a garnishee, because such sum was not a “credit intrusted” to the lender by the borrower within the meaning of the statute, and because the remedy for the money so paid was held to be a statutory redress for a wrong within the administration of the corrective police of the country, and was not for the recovery of money on contract relation.⁴ But there is no reason apparent why such money may not be secured by garnishment in states where the tort may be waived and the money recovered by an action of *indebitatus assumpsit*.⁵

§ 518. In case of partnerships—(a) Generally.—There is much diversity of opinion regarding the attachment of partnership property by seizure, as has been already shown.⁶ There is also a lack of uniformity in the judicial decisions of different states regarding the garnishment of debts due to co-partnerships or individual members thereof.

There is no doubt that when a co-partnership as such is indebted, a creditor thereof may, by process of garnishment, secure the money or property belonging to such co-partnership and in the hands or under the control of its debtor. A firm as a debtor stands in the same relation to its creditor in this regard as does an individual debtor. The individual members of a firm *in solido* are treated as one individual, either as the principal debtor or as a garnishee, and the firm’s creditors are

1. Foster v. Libby, 24 Me. 448.

3. Graham v. Moore, 7 B. Mon.

2. McGlinchy v. Winchall, 63 Me. 31. (Ky.) 53.

Otherwise a seller could always 4. Barker v. Esty, 19 Vt. 131.

evade the prohibitory law through 5. Compare, ante, 482.

the name of some friendly creditor. 6. Ante, vol. I., § 47.

McGlinchy v. Winchall, 63 Me. 31.

liable in the same manner as an individual's creditors.¹ The indebtedness, however, must be owing from or to the members of the co-partnership as a firm and not to them as individuals,² and not to part of them alone, or with others.³

§ 519. (b) **On a demand against an individual member.**—Regarding the garnishment of a debt due or property belonging to a co-partnership, however, on a demand existing against but one member thereof, the same rules of law will not apply as when the property of a firm is subjected to direct attachment at suit of a creditor of an individual member thereof. The reason for this is that direct attachment may be made and the property not removed or appropriated until all the liens upon it growing out of the partnership relation are discharged, while by garnishment a judgment against the garnishee would, when acquiesced in, divest the co-partner of his right and title in and to the property or fund, which can not be done while the accounts of the co-partnership remain unsettled or its debts unpaid, and because garnishment is a legal proceeding and the equitable rights between the garnishee and the defendant can not be adjudicated therein. A court of law has no right to adjust partnership affairs or appropriate the fund of all, for the payment of an individual debt. It is only after all the affairs of the firm have been settled that an individual share of a partner can be taken by process of garnishment and applied to the payment of his individual debt.⁴ In Connecticut the in-

1. *Richardson v. Lacey*, 27 La. Ann. 62; *Peck v. Barnum*, 24 Vt. 75; *Glenn v. Gill*, 2 Md. 1.

2. *Coverly v. Braynard*, 28 Vt. 738.

3. *Upham v. Naylor*, 9 Mass. 490; *Ford v. Detroit Dry Dock Co.*, 50 Mich. 358, 15 N. W. Rep. 509; *Farwell v. Wayne Circuit Judge*, (*Farwell v. Chambers*) 62 Mich. 316, 28 N. W. Rep. 859; *Mobley v. Lonbat*, 7 How. (Miss.) 318; *Atkins v. Prescott*, 10 N. H. 120.

Where some members of a partnership live within the state, funds in

the hands of the firm doing business within the state may be held by process of garnishment, although other members reside elsewhere in the United States. *Peck v. Barnum*, 24 Vt. 75; *Parker v. Danforth*, 16 Mass. 299; *Hart v. Anthony*, 15 Pick. (Mass.) 445.

4. *Henderson v. Cashman*, 85 Me. 437, 27 Atl. Rep. 344; *Winston v. Ewing*, 1 Ala. 129; *Johnson v. King*, 6 Humph. (Tenn.) 233; *White Mountain Bank v. West*, 46 Me. 15; *Wyman v. Stewart*, 42 Ala. 163; *Crescent Ins.*

terest of one partner in a debt due to the partnership can not be secured by process of garnishment to satisfy the indebtedness of an individual partner without showing the condition of the accounts between the partners, the solvency of the partnership and what right or interest the individual partner has therein.¹ Massachusetts is inclined to permit the appropriation of one partner's individual interest in a fund due to the firm, but holds that before either partner can rightfully claim to his own use or for the payment of his own debts any of the partnership effects, the partnership must be solvent and he must not be a debtor to it.²

A creditor of a firm may be held as a garnishee in Georgia, Pennsylvania and South Carolina.³

§ 520. (c) **Indebtedness to a firm has priority over indebtedness to a member.**—Although a fund due or property belonging to a firm be attached by garnishment, yet a subsequent process sued out on a demand against all will take precedence over the one sued out on the demand of the individual partner.⁴

Co. v. Baer, 23 Fla. 50, 1 So. Rep. 318; *Ripley v. People's S. Bank*, 18 Ill. App. 430; *Trickett v. Moore*, 34 Kan. 755; *Thomas v. Lusk*, 13 La. Ann. 277; *Ursuline Nuns v. Connelly*, 22 La. Ann. 51; *People's Bank v. Shryock*, 48 Md. 427; *Sheedy v. Second Nat. Bank*, 62 Mo. 17; *Birtwhistle v. Woodward*, 17 Mo. App. 277; *Pullis v. Fox*, 37 Mo. App. 592; *Mobley v. Lonbat*, 7 How. (Miss.) 318; *Whitney v. Dean*, 5 N. H. 249; *Treadwell v. Brown*, 43 N. H. 290; *Barry v. Fisher*, 8 Abb. (N. Y.) Pr. N. S. 369, 39 How. (N. Y.) Pr. 521; *Myers v. Smith*, 29 Ohio St. 120; *Lewis v. Paine*, Leg. Gaz. Rep. (Pa.) 508; *Sweet v. Read*, 12 R. I. 121; *M'Combe v. Dunch*, 2 Dall. (U. S.) 73; *M'Carty v. Emlen*, 2 Dall. (U. S.) 277; *Lyndon v. Gorham*, 1 Gall. Cir. Ct. (U. S.) 367; *Rich v. Solari*, 6 Mackey (D. C.) 371; *Huntoon v. Dow*, 29 Vt. 215.

1. *Church v. Knox*, 2 Conn. 514.

2. *Fisk v. Herrick*, 6 Mass. 271.

3. *Willis v. Henderson*, 43 Ga. 325; *Wallace v. Hull*, 28 Ga. 68; *McCarty v. Emlen*, 2 Dall. (U. S.) 277, 2 Yeates (Pa.) 190; *Knox v. Schepler*, 2 Hill (S. C.) 595; *Schatzill v. Bolton*, 2 McCord (S. C.) 478.

In South Carolina when the fund is reduced to money, the court will order only so much to be paid over as belongs to the individual partner sued and may, in its discretion, order security to be given for the moiety while a settlement is pending between the partners. *Chatzel v. Bolton*, 3 McCord (S. C.) 33.

In Pennsylvania it is the general rule that partnership effects are first to be appropriated to the payment of the partnership debts, but like every general rule it admits of an exception. *McCarty v. Emlen*, 2 Yeates (Pa.) 190.

4. *Hoskins v. Johnson*, 24 Ga. 625; *Denny v. Ward*, 3 Pick. (Mass.) 199

§ 521. (d) **Insolvency of firm defeats attachment of a partner's interest.**—Although a proceeding in attachment by garnishment may be begun against a creditor of the firm, to appropriate the individual interest of a member of a co-partnership, yet the insolvency of the firm will defeat the proceedings against the creditor, because the demands against the firm take precedence over the demands against the individual member.¹

This is true, although the partnership creditors have not commenced any action for the recovery of their demands; but the burden is upon the creditor of the partnership, after notice of the garnishment to prove that the partnership debts would exhaust the entire amount of the partnership property and assets.²

§ 522. (e) **When a partner may be a garnishee in an action against the firm.**—According to the general rules that no action at law can be maintained by one partner against another involving the partnership accounts, and that one partner may sue another on a balance which has been ascertained or agreed upon, an individual partner can not be made a garnishee by a firm creditor for any indebtedness from the partner to the firm so long as the partnership matters are unadjusted, but after a settlement of the partnership affairs any individual indebtedness from one partner to another or others may be secured by service of process of garnishment upon the one so indebted.³

No partner can be a garnishee either alone or jointly with others in an action commenced by a firm of which he is a

1. *Parker v. Wright*, 66 Me. 392; *Commercial Bank v. Wilkins*, 9 Me. (9 Greenl.) 28.

2. *Robinson v. Tevis*, 38 Cal. 611.

3. *Lathrop v. Snell*, 6 Fla. 750; *Marlin v. Kirksey*, 23 Ga. 164; *Ives v. Vanscoyoc*, 81 Ill. 120; *Bailey v. Lacey*, 27 La. Ann. 39; *Richardson v. Lacey*, 27 La. Ann. 62; *Parker v. Wright*, 66 Me. 392; *McSherry v. Brooks*, 46 Md. 103; *Burnham v. Hopkinson*, 17 N. H. 259; *Treadwell v. Brown*, 41 N. H. 12; *Laughlin v. May-*

bin, 15 Phila. (Pa.) 68; *Riddle v. Etting*, 32 P. St. 412; *Alter v. Brooke*, 9 Phila. (Pa.) 258; *Knerr v. Hoffman*, 65 Pa. St. 126; *Ellicott v. Smith*, 2 Cranch Cir. Ct. (U. S.) 543; *Pettes v. Spalding*, 21 Vt. 66; *Knapp v. Levanway*, 27 Vt. 298.

When one partner is garnished as the debtor of his co-partner, the jury will not be permitted to consider any unsettled partnership claims or accounts. *Ives v. Vanscoyoc*, 81 Ill. 120.

member, nor by himself alone because he can not be both a party plaintiff and a party defendant in the same action.¹

§ 523. (f) **A debtor of a member may be a garnishee in an action against the firm.**—Because of the general liability of an individual co-partner for the indebtedness of the co-partnership, a fund owing, or property belonging, to an individual member of a firm may be secured in an action against the firm of which he is a member, by the service of process of garnishment upon his debtor.²

When the garnishee is merely liable as a member of the firm and not upon an individual indebtedness, the other member should be joined and summoned because all parties jointly liable to the principal defendant should be served with process.³ But this state of facts can not arise when the firm itself is the principal defendant.⁴

§ 524. **In case of joint debtors—(a) When owing jointly must be jointly charged.**—When the debt which is owing to the principal debtor, and which debt is sought to be charged by the garnishment process is owing by several persons jointly, they must generally all be joined as garnishees in garnishment

1. *Denny v. Metcalf*, 28 Me. 389; *Caignett v. Gilbaud*, 2 Yeates (Pa.) 35. *Sheedy v. Second Nat. Bank*, 62 Mo. 17; *Blaisdell v. Ladd*, 14 N. H. 129; *Ullman v. Eggert*, 30 Ill. App. 310; *Ripley v. People's Savings Bank*, 18 Ill. App. 430; *Norcross v. Benton*, 38 Pa. St. 217. But a chose in action can not. *Pearce v. Shorter*, 50 Ala. 318.

Creditor's election.—When the creditor of a firm sues out a process of garnishment against a member of it he will be considered as having elected to proceed against the member solely, and on the member's answer admitting the indebtedness of the firm the creditor is entitled to have judgment against him. *Travis v. Tartt*, 8 Ala. 574.

2. *Travis v. Tartt*, 8 Ala. 574; *Pearce v. Shorter*, 50 Ala. 318; *Smith v. Cahoon*, 37 Me. 281; *Stevens v. Perry*, 113 Mass. 380; *Stone v. Dean*, 5 N. H. 502; *Russell v. Convers*, 7 N. H. 343;

Creditor's election.—When the creditor of a firm sues out a process of garnishment against a member of it he will be considered as having elected to proceed against the member solely, and on the member's answer admitting the indebtedness of the firm the creditor is entitled to have judgment against him. *Travis v. Tartt*, 8 Ala. 574.

3. *Treadwell v. Brown*, 41 N. H. 12; *Ellicott v. Smith*, 2 Cranch Cir. Ct. 543.

4. As to service of process of garnishment, see *post*, §§ 606-612.

proceedings;¹ for a process of garnishment can not generally reach a debt from two joint debtors by service upon one alone.² And if the personal effects of a defendant be in the hands of several persons who are all jointly liable to him and which is not under the exclusive control of either of them, they all must be summoned and joined as garnishees before interrogatories can be filed against them.³ It has been further said that not only parties liable jointly but parties liable jointly and severally to the defendant must all be summoned as garnishees.⁴ But on the other hand it has been said with reason that if one of two or more joint and several debtors can be alone charged as garnishee, and if it appears that this can be done without the risk of further liability against him, either to the payee or to any other person, and that he will not be otherwise prejudiced then he may be alone charged for the part which he individually owes.⁵

When joint debtors are required to be jointly summoned as garnishees in order to secure their joint indebtedness to the principal defendant, the omission to so join them in the process is properly matter for plea in abatement and if the person summoned desires to avoid process because his joint debtors are not also summoned, he must avail himself of the objection in his answer to the process.⁶

§ 525. (b) When not owing jointly must not be jointly charged.—The converse of the above rule is likewise true. If

1. Hoyt v. Robinson, 10 Gray (Mass.) 371; Sabin v. Cooper, 15 Gray (Mass.) 532; Rix v. Elliot, 1 N. H. 184; Hudson v. Hunt, 5 N. H. 538; Ladd v. Baker, 26 N. H. (6 Fost.) 76.

2. Hirth v. Pfeifle, 42 Mich. 31.

3. Frizzell v. Willard, 37 Ark. 478.

4. Treadwell v. Brown, 41 N. H. 12.

5. Ladd v. Baker, 26 N. H. (6 Fost.) 76.

6. Hathaway v. Russell, 16 Mass. 473; Hoyt v. Robinson, 10 Gray (Mass.) 371; Sabin v. Cooper, 15 Gray (Mass.) 532.

In Alabama process of garnishment may issue to any number of persons whether they hold property or are indebted jointly or severally to the principal defendant. Curry v. Woodward, 50 Ala. 258.

In Connecticut under a special statute the same rule is applied in garnishment as in attachment that process shall not be invalidated by the non-joinder of persons jointly liable. Hawley v. Atherton, 39 Conn. 309.

two or more persons are not jointly indebted to the principal defendant they can not generally be jointly charged as garnishees in one writ of garnishment. If several are distinctly indebted and have distinct interests they must be distinctly charged for they can not be jointly charged as having jointly in their hands the effects of the principal debtor.¹

In states where a misjoinder will invalidate the action of the writ such non-joinder may be taken advantage of by plea in abatement or may be made available by the garnishee in his answer.

§ 526. (c) **The writ should describe them as "jointly" liable.**—When a writ is sued out to be served upon several garnishees, to secure a joint indebtedness from them, it should indicate that they are to be held to a joint liability; but no strict rule has been laid down to indicate that unless such joint liability is particularly described as joint in the writ they can not be so charged. In fact it has been said that the court will give effect to the presumed intent of the plaintiff to attach their joint as well as several indebtedness when their joint liability is attachable and they are properly served.²

§ 527. (d) **The writ must issue in an action against the identical persons to whom the garnishees are indebted.**—When the principal suit is against a number of defendants, and process of garnishment is *sued out* against several garnishees jointly,

1. *Thorn v. Woodruff*, 5 Ark. 55; *Bender v. Bridge*, 18 Ark. 291; *Ball v. Young*, 52 Mich. 476; *Atkinson v. Minor*, 1 Tyler (Vt.) 122.

On the contrary in Connecticut, by force of special statute, the rule regarding direct attachment is applied to garnishment as well, and the misjoinder of any person as garnishee will not invalidate the action of the writ. *Hawley v. Atherton*, 39 Conn. 309.

2. *Lamson v. Bradley*, 42 Vt. 165.

Set-off.—Where one of joint garnishees claims that the principal de-

fendant is indebted to him individually he was not permitted to set off such claim against the joint indebtedness of himself and the others. *Wells v. Mace*, 17 Vt. 503.

But where a part only of several joint debtors were summoned those who were summoned were allowed the benefit of all such set-offs as the other co-debtors are entitled to against the principal, but, not it seems, without the consent of such co-debtors. *Hathaway v. Russell*, 16 Mass. 473; *Brewer v. Pitkin*, 11 Pick. (Mass.) 298.

and their answer shows an indebtedness to only a part of the principal defendants, or to all and still other persons, then they will be discharged. In other words, in order to hold persons summoned as garnishees, their indebtedness must be owing to the same persons who are indebted to the plaintiff, for since garnishment is in effect a suit against the garnishees brought by the principal defendant,¹ it is only in such cases that they could recover.² The exception to this rule is where the garnishee or garnishees are indebted to a member of a co-partnership, which indebtedness may be secured on a suit against the partnership because of the member's general liability for the debts of the partnership.³

This rule, however, does not affect the *service* of process of garnishment upon only a part of the joint garnishees; for, by force of statute, a service upon, and answer by, fewer than all, may be sufficient *prima facie* to sustain a judgment against all jointly.⁴

§ 528. (e) **Effect of death of joint debtor.**—If one of the principal defendants die, process of garnishment can not issue against a joint debtor of those defendants until the estate of

1. *Ante*, §§ 465 and 515.

2. *Ford v. Detroit Dry Dock Co.*, 50 Mich. 358; *French v. Rogers*, 16 N. H. 177; *Lamar v. Reid*, 2 McMull (S. C.) 346; *Fairchild v. Lampson*, 37 Vt. 407.

If the garnishee's answer disclose that he or they are indebted to the defendant or defendants and another jointly, and the garnishees are not discharged, the joint creditors (the principal defendants and the other person) may question the judgment collaterally and may recover the full amount of their claim against the garnishees without any deduction on account of such judgment. *Hawes v. Waltham*, 18 Pick. (Mass.) 451.

Contrary rule.—A contrary rule has been applied in Maine and New Hampshire. *Thompson v. Taylor*, 13

Me. 420; *Parker v. Guillow*, 10 N. H. 103.

In Maine it was said that the interest of a joint contractor could be reached by garnishment, although the effect might be to sever the joint contract, and that if the joint creditors should claim a priority over the individual creditors of either of the contractors, they should present the question to the court by a suit against all the contractors and summon the garnishees. *Whitney v. Munroe*, 19 Me. 42. As to priority of joint demands over individual demands, see *ante*, § 520.

3. *Ante*, § 522.

4. *Hennessey v. Farrell*, 4 Cush. (Mass.) 267; *Oakley v. Aspinwall*, 2 Sandf. (N. Y.) 7.

the deceased is represented in the suit.¹ Where a garnishee dies before disclosure, the garnishment must fail because no disclosure can be made by his personal representative.² But the rule would be different where one of joint garnishees might disclose as to all, and in the case of surviving partners.

§ 529. **In case of marriage.**—Under the law in regard to married women as it exists in recent times, a married woman may be held a garnishee in the same manner as any other individual, and since the law properly considers a wife to be a separate and distinct individual from her husband, a wife may be charged as the garnishee of her husband.³

Under a very old rule of law which entitled the husband to sue in his own name for the money or property belonging to the wife, it was held that the money or property of the wife in the hands of a third person could be secured by process of garnishment in a suit against the husband for the debt of the husband.⁴ But by another old rule, the property of the wife did not belong to the husband until he had actually reduced it to his possession, and until then such property could not be secured by garnishment for the payment of the husband's debt.⁵

1. *Rawson v. Cochran*, 17 Ga. 80.

2. *Ante*, § 511.

3. *Jones v. Roberts*, 60 N. H. 216.

4. *State v. Krebs*, 6 Har. & J. (Md.) 31; *Bradbury v. Andrews*, 37 Me. 199; *Babb v. Elliott*, 4 Harr. (Del.) 466.

Under this rule the income for the wife's labor inured to the benefit of the husband, and although the wages were paid to the wife the employer was not exonerated, but the husband could still collect the amount from him, and hence the employer of the wife could be held a garnishee in an action brought to recover a husband's debt. *Bradbury v. Andrews*, 37 Me. 199.

5. *Pickering v. Wendell*, 20 N. H. 222; *Probate Court v. Niles*, 32 Vt. 775.

Non-residence of husband makes a resident woman at marriage a non-resident.

—A man residing in New York and a woman residing in New Jersey married in New Jersey, went to Europe and returned to their respective places of residence. While absent an attachment was sued out on the wife's property on account of her debt contracted before marriage. The law required that the husband should be joined with the wife in the suit. No proper service could be made upon both in New Jersey; therefore the attachment was held to have issued properly. *Hackettstown Bank v. Mitchell*, 28 N. J. L. (4 Dutch.) 516.

These old rules are now practically abrogated, and the husband and wife generally hold their property separately, and a debtor of the wife can no more be made a garnishee without her consent, to secure a debt from the husband, than if the wife were a stranger.¹

§ 530. **In case of infancy.**—The wages of a minor are deemed to belong to the father, and hence may be secured to pay the debt of the father by process of garnishment served upon the employer; but if the minor has had “his time” given to him by his father, any money he may thereafter earn can not be appropriated to the payment of the father’s debt by one having knowledge of the emancipation.²

An infant may be held a garnishee on account of any personal property in his hands belonging to the principal debtor, and for any debt which he has contracted in the purchase of necessities.³

1. *Himstedt v. German Bank*, 46 Ark. 537; *Houghton v. Lee*, 50 Cal. 101; *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. Rep. 909; *Chapman v. Williams*, 13 Gray (Mass.) 416; *Wheeler v. Moore*, 13 N. H. 478; *Parks v. Cushman*, 9 Vt. 320; *Hayward v. Clerk*, 50 Vt. 612.

As to when the money received as a pension by the husband becomes the property of the wife, so as to be beyond the reach of garnishment, see *Hayward v. Clerk*, 50 Vt. 612.

Where the husband and wife have held by entireties, and a sale having been made, the proceeds remains in the hands of the agent, each is entitled to a moiety, and the moiety of the husband may be reached by his creditors. *Fogleman v. Shively*, 4 Ind. App. 197, 30 27 N. E. Rep. 909.

Where a wife has declared a homestead on their common property, and the husband procured an insurance on the house situated thereon, the sum due from the insurance company, because of the house having

burned, can not be garnished at suit of the husband’s creditors. *Houghton v. Lee*, 50 Cal. 101.

Where a fund is deposited in a bank by the wife, and it is claimed by the husband’s creditors as having been fraudulently transferred to her, it can not be reached by garnishment. The remedy is in equity. *Himstedt v. German Bank*, 46 Ark. 537.

In insurance payable to wife, children have no interest.—Where a policy is expressly for the benefit of the wife, the children have no interest therein during her lifetime, although such policy may be attachable by force of special statute in the lifetime of the assured, the children need not be made parties defendant. (The practitioner may note a difference between a demand which is sure to become due at some time and one which depends upon a contingency which may or may not occur.) *Troy v. Sargent*, 132 Mass. 408.

2. *Bray v. Wheeler*, 29 Vt. 514.

3. *Scofield v. White*, 29 Vt. 330.

When an infant is made a garnishee, and he has a guardian, the guardian must be summoned; if not, the plaintiff will, at his own peril, apply for a guardian *ad litem*.¹

The guardian *ad litem* need not be appointed where a minor becomes of age, after process of garnishment is served upon him and before a disclosure is made thereon.²

§ 531. When effects held in trust. (a) Generally.—The right of action at law must exist between the principal debtor and the person contemplated as a garnishee before garnishment can be made efficient; therefore, a trustee can not, during the pendency of the trust, be held as a garnishee in an action to collect a debt which the *cestui que trust* owes.³ The creditor has no better claim to the fund or property than the beneficiary has, and when the latter has no right to maintain an action for it or any part of it, garnishment against the trustee will be unavailing.⁴ So long as the beneficiary has only an action in

1. Wilder v. Eldridge, 17 Vt. 226.

2. Wilder v. Eldridge, 17 Vt. 226.

3. Avery v. Lockhard, 75 Ala. 530; Plunkett v. Le Huray, 4 Harr. (Del.) 436; Prescott v. King, 52 Ga. 50; O'Neill v. Sewell, 85 Ga. 481, 11 S. E. Rep. 831; Dressor v. McCord, 96 Ill. 389; Steib v. Whitehead, 111 Ill. 247; Chapin v. Jackson, 45 Ind. 153; Meek v. Briggs, 87 Iowa 610, 54 N. W. Rep. 456; Cutters v. Baker, 2 La. Ann. 572; Lane v. Nowell, 15 Me. 86; Bottom v. Clarke, 7 Cush. (Mass.) 487; Guild v. Holbrook, 11 Pick. (Mass.) 101; Bridgen v. Gill, 16 Mass. 522; Marvel v. Babbitt, 143 Mass. 226, 9 N. E. Rep. 566; McIlvaine v. Lancaster, 42 Mo. 96; Lackland v. Garesche, 56 Mo. 267; Collins v. Brigham, 11 N. H. 420; Pickering v. Wendell, 20 N. H. 222; Cram v. Shackleton, 64 N. H. 44, 5 Atl. Rep. 715; Keyser v. Mitchell, 67 Pa. St. 473; *In re Seipe's Estate*, (Pa. Orph. Ct.) 11 Pa. Co. Ct. Rep. 27.

Trustees of a trunk.—Where a small

trunk was, by consent, placed in a vault in a bank, the bank officers not having a right to open the trunk and not knowing its contents, it was held that neither the bank nor its officers could be charged with process of garnishment. *Bottom v. Clarke*, 7 Cush. (Mass.) 487.

Who is a trustee.—One who has the actual possession of property conveyed to him by the principal, or the right to the actual possession and the power to take immediate possession of it, is a trustee within the meaning of the statute in Maine, exempting him from liability under process of garnishment. *Lane v. Nowell*, 15 Me. 86.

4. *Meek v. Briggs*, 87 Iowa 610, 54 N. W. Rep. 456.

Secret trust.—Where one, under color of a sale, receives goods but with secret trust to deliver them to the vendor, which he accordingly does, he can not be held liable by process of garnishment *afterwards*

equity against his trustee garnishment, will not be availing,¹ because garnishment is but a legal proceeding, and equitable rights can not be subjected by it.²

When, however, the beneficiary has a right of action at law against the trustee, on the contract relation, because of a fund being due and unpaid, the trustee may also be held as a garnishee in a suit brought against the *cestui que trust*.³ When the trustee has performed the trust, with the exception of passing over the balance to whom it belongs, he may be held liable in garnishment.⁴ Likewise, when the time has arrived for a spe-

sued out. *Bailey v. Ross*, 20 N. H. 302.

Void trust.—The rule does not apply in case the trust created was fraudulent as to the creditor. *Lackland v. Garesche*, 56 Mo. 267.

When the trust is void and an action will lie to recover the fund in the trustee's hands, he may be made a garnishee in a suit against the person who is entitled to recover the funds. *Todd v. Hall*, 10 Conn. 544; *Williams v. Reed*, 5 Pick. (Mass.) 480.

1. *Richards v. Merrimack, etc.*, R. R. 44 N. H. 127; *McPherson v. Snowden*, 19 Md. 197; *Chase v. Thompson*, 153 Mass. 14, 26 N. E. Rep. 137; *Emerson v. Thompson*, 153 Mass. 14, 26 N. E. Rep. 137; *Commercial Nat. Bank v. Manufacturers' Equitable Assn.*, 20 Ill. App. 133; *Perry v. Thornton*, 7 R. I. 15.

A garnishment was permitted to be served before the ratification of a final account, but such process was not permitted to affect the funds of the trustee or compel any modification of the final account for the benefit of the attaching creditor. *McPherson v. Snowden*, 19 Md. 197.

2. *Ante*, § 486.

3. *Bentley v. Shrieve*, 4 Md. Ch. 412; *Williams v. Jones*, 38 Md. 555; *Mattingly v. Grimes*, 48 Md. 102; *Haskell v. Haskell*, 8 Metc. (Mass.) 545; *Sturtevant v. Robinson*, 18 Pick. (Mass.) 175; *Wood v. Partridge*, 11

Mass. 488; *Bissell v. Strong*, 9 Pick. (Mass.) 562, 564; *Russell v. Lewis*, 15 Mass. 127; *Harrison v. Phillips Academy*, 12 Mass. 456, 466; *Pierson v. Weller*, 3 Mass. 564; *Saunders v. Robinson*, 144 Mass. 306, 10 N. E. Rep. 815; *In Matter of Cascadier*, Col. & C.'s (N. Y.) Cas. 116; *In Matter of Cascaden*, 2 Johns. (N. Y.) Cas. 107; *Peck v. Randall*, 1 Johns. (N. Y.) 165; *Park v. Matthews*, 36 Pa. St. 28; *Fenton v. Fisher*, 106 Pa. St. 418; *Jepson v. International Fraternal Alliance*, 17 R. I. 471, 23 Atl. Rep. 15; *Hemmenway v. Pratt*, 23 Vt. 332; *Felch v. Eau Pleine L. Co.*, 58 Wis. 431; *Goode v. Barr*, 64 Wis. 659; *Greene & Button Co. v. Remington*, 72 Wis. 648, 40 N. W. Rep. 643; *Schuerman v. Foster*, 82 Wis. 319, 52 N. W. Rep. 311; *Van Riswick v. Lamon*, 2 MacArthur (D. C.) 172.

4. *Van Riswick v. Lamon*, 2 MacArthur (D. C.) 172.

One who has received money in fulfillment of an agreement regarding the sale of certain land on foreclosure and who has been directed to "pay it over" to the principal debtor, is liable as a garnishee to a creditor of the latter before he has done so. *Schuerman v. Foster*, 82 Wis. 319, 52 N. W. Rep. 311.

Where one has agreed to apply the balance of certain funds received on a sale as the seller shall direct, and

cific trust to be fulfilled by the payment of the fund, or the delivery of the property, and the same has not been done, the trustee may be held as a garnishee by a creditor of the *cestui que trust*,¹ unless such payment or delivery has been stayed;

after being directed has made tender of payment to the person indicated, which payment was refused, may be held as a garnishee in an action against such person. *Greene & Button Co. v. Marshall*, 72 Wis. 648, 40 N. W. Rep. 643.

Where one should have paid money according to directions, and has otherwise paid it, he may be held a garnishee at suit of a creditor of the one to whom it should have been paid. *Felch v. Eau Pleine L. Co.*, 58 Wis. 431; *Sturtevant v. Robinson*, 18 Pick. (Mass.) 175.

Where moneys have been collected for benevolent societies by persons whose duty it was at that time to remit to the society all the moneys collected by them, the moneys in their hands may be secured by garnishment as the property of the society. *Jepson v. International Fraternal Alliance*, 17 R. I. 471, 23 Atl. Rep. 15.

Money collected by a mutual benefit society or insurance company, but on which the beneficiary could not yet maintain an action at law, can not be secured by process of garnishment served upon such society. *Saunders v. Robinson*, 144 Mass. 306, 10 N. E. Rep. 815.

Trustee appointed by court.—Money in the keeping of a trustee of the court can not be attached. *Bentley v. Shrieve*, 4 Md. Ch. 412. But a trustee appointed by a court is not such a public officer as that funds in his hands can not be attached. *Fenton v. Fisher*, 106 Pa. St. 418; *ante*, § 505.

But when his accounts have been audited and ratified, the amount belonging to the debtor ascertained, and

order passed directing the trustee to pay it over, which he has not done, he may be held as a garnishee by a creditor of the person entitled thereto. *Williams v. Jones*, 38 Md. 555.

Proceeds paid into court.—Where real estate has been sold under a decree of the court, the sale ratified and the proceeds paid into the court under an order to that effect and deposited in bank to the credit of the cause, a garnishment process will not reach a part of such fund. *Mattingly v. Grimes*, 48 Md. 102.

1. *Martin v. Copeland*, 77 Ga. 374, 3 S. E. Rep. 256; *Knefler v. Shreve*, 78 Ky. 297; *Williams v. Young*, 46 Iowa 140; *Abbott v. Stinchfield*, 71 Me. 213; *Frothingham v. Haley*, 3 Mass. 68; *Lane v. Felt*, 7 Gray (Mass.) 491; *McIlvaine v. Lancaster*, 42 Mo. 96; *Park v. Matthews*, 36 Pa. St. 28, 2 Grant (Pa.) Cas. 136; *McDonald v. Moore*, 34 Tex. 384.

Rents devised to a trustee, with direction that they be paid to the *cestui que trust* as they fall due, may be secured by process of garnishment served upon the trustee at such time. *Knefler v. Shreve*, 78 Ky. 297. But where such rents are collected by an agent of the trustee, such agent can not be made a garnishee in an action against the beneficiary. *McIlvaine v. Lancaster*, 42 Mo. 96. As to "Agents," see *ante*, § 548 *et seq.*

One who is bound to deliver on demand moneys which he receives from collections he can not be charged as a garnishee until the money has been paid to him. *Frothingham v. Haley*, 3 Mass. 68.

A landlord, who is taking a growing

as by an appeal from an order directing its payment or delivery.¹ Furthermore, where a specific trust has been performed by a trustee, and a surplus remains in his hands which he should refund to the owner, such surplus may be secured by process of garnishment sued out by a creditor of the person entitled to such surplus.² But he can not be held before such

crop of his tenant, agreeing to pay the tenant's debts may be made a garnishee at suit of a creditor of the tenant's creditor, although the tenant's creditor was no party to the agreement. *Martin v. Copeland*, 77 Ga. 374, 3 S. E. Rep. 256. This is on the rule that where a promise is made upon a valid consideration to one person for the benefit of another, the latter may maintain an action thereon. *Kelly v. Roberts*, 40 N. Y. 432. And if he could maintain an action his creditor may maintain garnishment. *Ante*, §§ 475-482.

On a garnishee's answering, that he has received a check with authority to receive the amount and pay it to the principal debtor on certain conditions which have been complied with, and that he has offered to pay the principal debtor so much of the amount as is not attached to this process, he can not be charged if he does not state and is not asked whether he has received the money on the check. *Lane v. Felt*, 7 Gray (Mass.) 491. Further as to liability on answer, see *post*, § 639.

Contra where fund insufficient. — When a trustee is required to distribute funds among certain individuals and there is not enough to satisfy all the purposes of the trust, the share to which one of the persons will be entitled can not be secured by garnishment at suit of a creditor of such person. *Coffield v. Collins*, 4 Ired. (N. C.) L. 486.

Funds in the hands of a trustee to

await the performance of some act by a third person. — Where money was paid into the hands of an attorney to be by him held until certain deeds were executed, when it was to be turned over to certain persons, it was held that such fund was a trust fund in his hands, and until all the conditions of the trust were performed the fund could not be reached by a process of garnishment served upon the attorney. *Lackett v. Rumbaugh*, 45 Fed. Rep. 23.

1. *McKenzie v. Noble*, 13 Rich. L. (S. C.) 147.

2. *Price v. Masterson*, 35 Ala. 483; *Lightfoot v. Rupert*, 38 Ala. 666; *Mobile St. Ry. Co. v. Turner*, 91 Ala. 213, 8 So. Rep. 684; *Cox v. Reeves*, 78 Ga. 543, 3 S. E. Rep. 620; *McDonald v. Gillett*, 69 Me. 271; *Barker v. Osborne*, 71 Me. 69; *Webb v. Peele*, 7 Pick. (Mass.) 247; *Harmon v. Osgood*, 151 Mass. 501, 24 N. E. Rep. 401; *Randall's Case*, 1 Caines (N. Y.) 513; *Rogers Locomotive, etc., Works v. Kelley*, 88 N. Y. 234; *Hearn v. Crutcher*, 4 Yerger, (Tenn.) 461; *Mensing v. Engelke*, 67 Tex. 532, 4 S. W. Rep. 202; *Williams v. Hill*, 19 How. (U. S.) 246.

But before a trustee having an express trust to perform can be held liable by others, it must be made to appear that a surplus will remain in his hands after the performance of the trust and the payment of the expenses. *Younkin v. Collier*, (Cir. Ct.) 47 Fed. Rep. 571.

Any necessary expenditures by the garnishee, as on account of delay, etc., should be deducted from the sur-

time has arrived, although he may be ready to complete his trust.¹

When a trust fund or property is delivered to a trustee, for the purpose of paying the general indebtedness of the grantor, then such trustee may be made garnishee at suit of a general creditor.² But when the trustee is directed to pay certain indebtedness, the fund can not be reached by a creditor having a demand not named in the trust,³ unless the beneficiary waive

plus in the hands of the garnishee. *Mobile St. Ry. Co. v. Turner*, 91 Ala. 213, 8 So. Rep. 684; *Williams v. Hill*, 19 How. (U. S.) 246.

Gift void as to creditors, as to surplus after necessary expenditures.—Where the donor made a gift saying, "you take this money; when I die, bury me, and keep the rest," is void as to the excess after paying the funeral expenses and consequently the donee in such case may be held by process of garnishment for the surplus at suit of a creditor of the deceased. *Harmon v. Osgood*, 151 Mass. 501, 24 N.E. Rep. 401.

When no surplus, judgment unavailing.—When it appears that the purposes for which the trust was created have not been accomplished and that after the execution of the trust there will be no surplus, a trustee is not liable as garnishee, although a judgment may be entered against him as such. *Lightfoot v. Rupert*, 38 Ala. 666.

1. *New Hampshire I. F. Co. v. Platt*, 5 N. H. 193.

When the time has arrived for the delivery of property in compliance with an express trust and the trustee has sold the property, the money he has received therefor may be reached by process of garnishment. *Brown v. Silsby*, 10 N. H. 521.

In case of conversion of choses in action.—Although a trustee can not be held by garnishment for notes or

securities which he holds for the benefit, and as the agent, of another; yet if he has converted them to his own use, he stands in respect to them, and to the principal debtor, in the same position as he would have been had he actually received money upon them, and therefore may be charged as a garnishee for any surplus which would remain after satisfying the trust. *Smith v. Wiley*, 41 Vt. 19.

Where trust indefinite fund still belongs to depositor.—Money deposited without any specific direction as to its application may be subjected to process of garnishment at suit of a creditor of the depositor. *Vance v. Geib*, 27 Tex. 272.

2. *Arnold v. Elwell*, 13 Me. 261; *Sanford v. Bliss*, 12 Pick. (Mass.) 116; *Parker v. Kinsman*, 8 Mass. 486; *Noble v. Smith*, 6 R. I. 446; *Chapman v. Mears*, 56 Vt. 389; *First Nat. Bank v. Brainerd*, 28 Fed. Rep. 917.

When agreement as to trust incomplete.—As to the appropriation of railway bonds by a creditor of the company when an incomplete contract exists as to the distribution of such bonds, see *Warren v. Booth*, 51 Iowa 215.

3. *Little Wolf R. I. Co. v. Jackson*, 66 Wis. 42.

Where a trust was created for the purpose of paying certain creditors and the name of one of the creditors intended to be paid was omitted there-

his right to the fund by consenting that judgment may be entered for the attaching creditor; in which case the garnishee can not defend on the ground that he is bound to pay the fund to the *cestui que trust*.¹ Until, however, the third person to whom the trustee is directed to pay a fund, knows of it and in some manner recognizes such trustee as his debtor, the fund remains the property of the person creating the trust, and can not be reached, by a creditor of the person for whom the trust was created, by process of garnishment.² Such fund may be garnished by another creditor of the person creating the trust.³ And although the trustee may have paid the fund on the demand of a creditor of the person, he may yet be held liable in such a garnishment proceeding.⁴

§ 532. (b) **Executors and administrators as trustees.**—When, by will, legacies are demised for a lawful purpose, the executor or administrator is a trustee for the fulfillment of the purposes of the will and governed by the rules relating to trustees in general; therefore, funds of the estate in their hands can not be secured by process of garnishment to satisfy general indebtedness until the trust is fulfilled.⁵ But legacies when due from the executor may generally be secured by a process of garnishment at suit of a creditor of the legatee.⁶ The from, the trustee can not, after he has paid the fund to the creditors named, be held as a garnishee for one not named. *Woodward v. Wyman*, 53 Vt. 645.

Where a garnishee has agreed to pay certain debts of the principal debtor to the amount of his indebtedness to him, then he can not be held liable in garnishment. *Beardsley v. Beardsley*, 23 Ill. App. 317.

1. *Des Moines Sav. Bank v. Colfax Hotel Co.*, 88 Iowa 4, 55 N. W. Rep. 67.

2. *Huntley v. Stone*, 4 Wis. 91; *Ridge v. Olmstead*, 73 Mo. 578; *Baker v. Moody*, 1 Ala. 315.

Where such a garnishee answered that he had in his possession a sum

of money belonging to the defendant in the attachment, but which he was informed by him was to be paid over to another person, but that person had given no notice of any claim to it, a judgment against the garnishee condemning the money as the property of the defendant in attachment was correct. *Baker v. Moody*, 1 Ala. 315.

3. *Witter v. Little*, 66 Iowa 431.

4. *Huntley v. Stone*, 4 Wis. 91.

5. *Chase v. Currier*, 63 N. H. 90; *Banfield v. Wiggin*, 58 N. H. 155; *Carson v. Carson*, 6 Allen (Mass.) 397; *White v. White*, 30 Vt. 338.

6. *Cady v. Comey*, 10 Metc. (Mass.) 459; *ante*, §§ 510 and 512.

As to garnishment where the testa-

rule regarding the recognition of the trustee as a debtor by the beneficiary, as indicated in the preceding section, applies.¹

§ 533. (c) **Trustee charged with support of an individual.**—A trustee charged with the support of another person is not, during the life of such person, a debtor to him when the consideration does not move from the person to be supported; therefore the trustee can not be held liable by process of gar-

mentary trustee was not to be "subject to execution, attachment, or sequestration of any debts or liabilities" "of the *cestui que trust*," see *Guardians, etc., v. Mintzer*, 16 Phila. (Pa.) 449; *Thackara v. Mintzer*, 39 Legal Intelligencer (Pa.) 459. Compare *Smith v. Moore*, 1 Ala. Sel. Cas. 342.

Annuities for life.—It has been said that there is nothing immoral or unconscientious in a father providing a trust fund for the support of his child which shall not be made liable for the debts of such child, and that such a provision will not be in conflict with a statute making estates held in trust subject to the payment of the debts of the *cestui que trust*. *Pope's Exec'rs v. Elliott*, 8 B. Mon. (Ky.) 56.

The rule is that when a testamentary trustee is given a discretion to pay the fund or a part thereof as he may think proper to the beneficiary or for his support, then such indebtedness not being absolute within the rule, *ante*, §§ 480 and 481, the trustee can not be held as a garnishee at suit of the beneficiary's creditor. *Keyser v. Nicholas*, 7 Phila. 150; *Hall v. Williams*, 120 Mass. 344; *Bridgen v. Gill*, 16 Mass. 522; *Still v. Spear*, 45 Pa. St. 168; *White v. Jenkins*, 16 Mass. 62; *Clement v. Clement*, 19 N. H. 460. But where a trust is created for one for life with no restriction upon alienation or provision against liabilities

for debts, the income is subject to attachment at suit of the beneficiary's creditor, notwithstanding the manifest intention of the testator to provide maintenance for the *cestui que trust* is thus defeated. *Estates of James McCann*, 16 Phila. (Pa.) 224.

When payment restricted.—Where a fund was to be paid to the testator's daughter in person, and not upon any order or assignment by her, it was not permitted to be held in the trustee's hands by process of garnishment. *Steib v. Whitehead*, 111 Ill. 247.

Legacy uncalled for.—Where a trustee was directed by a testator to apply the income of certain property annually for the support of certain daughters, and which income had never been called for, it was held that it could not be reached by process of garnishment sued out by a creditor of such daughters. *Hinckley v. Williams*, 1 Cush. (Mass.) 490. See the reason for the rule, *ante*, § 521.

1. *Where a husband entitled to legacy of a wife.*—Where a legacy was for the use of the husband and wife during their joint lives, in a state where the husband was entitled to the whole income during the joint lives of himself and wife, such income was held subject to garnishment at suit against the husband. *Napier v. Wightman, Spears* (S. C.) Ch. 357.

nishment at suit of a creditor of such persons.¹ But where the trustee has failed to provide such support, and the party to be supported has been awarded a specific sum because of such failure, then such award becomes an indebtedness subject to attachment by process of garnishment at suit of a creditor of the person entitled thereto.²

A son who is under obligation for the payment of certain sums of money, and the delivery of certain quantities of provision to his father, at fixed times in each year during his father's life, can not be charged by process of garnishment at suit of his father's creditors for anything not actually payable. Future payments being contingent they can not be reached.³ A son who supports his indigent father is not liable as a garnishee at suit of the father's creditor, although the labor performed by the father was worth more than the support furnished, if the father claims no compensation and the son has made no promise of payment.⁴

§ 534. When effects have been assigned—(a) No longer the property of the assignor.—An assignment made upon a good consideration divests the assignor of his title and invests the assignee with that title. The entire estate passes to the as-

1. *Briggs v. Beach*, 18 Vt. 115.

Widow's award can not be reached.—

When a probate court makes an allowance for the support of a widow out of the proceeds of the estate, such sum can not be reached by process of garnishment served upon the executor or administrator, although a special statute in force may provide that any debt, legacy or distributive share which is or may become due to any person from the estate of the deceased person, his creditors may attach, in the hands of the executor or administrator. *Barnum v. Boughton*, 55 Conn. 117.

2. *Dickinson v. Dickinson*, 59 Vt. 678, 10 Atl. Rep. 821.

Surplus.—Where one is charged

with the support of another during life, and then to the payment of a fund or balance due to another person, the balance does not become due to such third person until after the death of the other, and before then it can not be garnished by a debtor of such third person. *Morey v. Sheltus*, 47 Vt. 342.

3. *Sayward v. Drew*, 6 Me. 263.

Where a son receives a fund belonging to the father, for which he might be otherwise charged, yet where he is under obligation to see to his board, etc., it is proper matter to set off against other demands. *Sampson v. Hyde*, 16 N. H. 492.

4. *Cobb v. Bishop*, 27 Vt. 624.

signee and no longer belongs to the assignor.¹ And a written assignment bearing a certain date will, when there is nothing to repel the presumption that it bears its true date, be effectual

1. *Lewis v. Commissioners*, 14 Colo. 371; *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56 Iowa 245; *Stockton v. Hall*, Hardin (Ky.) 160; *Porter v. Bulard*, 26 Me. 448; *Emery v. Lawrence*, 8 Cush. (Mass.) 151; *Perkins v. Parker*, 1 Mass. 117; *Anderson v. Odell*, 51 Mich. 492; *Coleman v. Scott*, 27 Neb. 77.

An agreement, which is not based upon a new consideration, between a creditor and a debtor, that the former shall pay a certain third person is not, in the absence of assent by such third person, and does not create, such an interest in such third person as will prevent the debt from being held by attachment in a suit against a creditor. *Kelly v. Roberts*, 40 N. Y. 432.

What is an assignment.—An assignment or alienation, to defeat an attachment, must be a valid transfer of the estate from one to the other. *Pollard v. Somerset, etc., Ins. Co.*, 42 Me. 221; *Masters v. Madison, etc., Ins. Co.*, 11 Barb. (N.Y.) 624. It must be a valid transfer of the funds or property. A mere promise of a debtor to pay a creditor out of a particular fund when collected, does not operate as a transfer of the fund of the creditor. If it did it would operate as an extinguishment of the debt by such mere promise and the fund would be at the risk of the creditor contrary to the rules of law and perhaps of the intent of the parties. *Connely v. Harrison*, 16 La. Ann. 41.

The fact that a vendor directs his vendee to pay the indebtedness of the former, to certain third persons from a balance of purchase-money in the

hands of the latter does not amount to an assignment thereof, so as to constitute the vendee the debtor of the vendor's creditors. Therefore, the vendee may still be made a garnishee at suit of a creditor of the vendor, and if such vendee, after notice of the garnishing creditor's lien, pay over such money according to the direction of the vendor, he will nevertheless be liable to the garnishing creditor. *Keithley v. Pitman*, 40 Mo. App. 596.

A power of attorney authorizing one to collect money on a fire insurance policy and with it to pay a certain debt is not such an assignment of the policy as to prevent the money due thereon and still in the company's hands, from being secured by garnishment sued out by another creditor of the assured. *Greenwood v. Boyd & Baxter Furniture Factory*, 86 Ga. 582, 13 S. E. Rep. 128.

Neither is a power of attorney giving authority to sell certain stock to pay certain debts, and place the balance to the credit of the owner. *Cobb v. Champlin*, 33 Miss. 406. The balance is attachable. See *post*, § 545.

One case in Pennsylvania holds to the contrary, and says that the power of attorney to collect certain sums of money and pay certain creditors is virtually an assignment, because it holds that such a power is no longer revocable, and that such an assignment comes within the purview of acts relating to transfers for the benefit of creditors. The same case further holds that the statute requiring such an assignment to be recorded, an omission so to do would leave the fund,

and take priority over subsequent alienations or liens, although no evidence be made of its delivery or of its receipt and acceptance at such prior time by the assignee.¹ And where an assignment of title is shown, it will be considered as continuing to exist until there has been proof given from which it can be inferred that it has been impaired or destroyed.²

§ 535. (b) **Can not be secured to satisfy his debt.**—When the owner has lost all power over his property, and when title to it has become legally vested in another, or where, for a valuable consideration, his claim against a third person has been assigned, his creditors can not recover such indebtedness by process of garnishment served upon the one who did hold the property or owe the debt.³

§ 536. (c) **Assignee's equitable interest will be protected from garnishment.**—The real owner of a fund or property, although he derived his title through an equitable assignment, has such an interest therein as will be protected by law against

when collected, subject to attachment by the assignor's creditors. *Watson v. Bagaley*, 12 Pa. St. 164. *note*; *Kingman v. Perkins*, 105 Mass. 111.

Assignment of interest in joint property.—Where one of two joint owners assigns his interest in a chattel or fund, his creditor can not acquire any interest therein by attachment, not even by attachment of a judgment inadvertently entered in favor of both. *Manny v. Adams*, 32 Iowa 165.

1. *Wallace v. Maroney*, 6 Mackey (D. C.) 221; *Sandidge v. Graves*, 1 Patton Jr. & H. (Va.) 101.

2. *Porter v. Bullard*, 26 Me. 448.

3. *St. John v. Smith*, 1 Root (Conn.) 156; *Horn v. Booth*, 22 Ill. App. 385; *Easley v. Gibbs*, 29 Iowa 129; *Bank of St. Mary v. Morton*, 12 Rob. (La.) 409; *Porter v. Bullard*, 26 Me. 448; *Taylor v. Collins*, 5 Gray (Mass.) 50,

note; *Kingman v. Perkins*, 105 Mass. 111.

If an infant, for a good consideration, assign a debt due to him, it can not thereafter be attached by garnishment in a suit against him. *Kingman v. Perkins*, 105 Mass. 111.

Rent follows assignment of reversion.—Garnishees, when served, were tenants for years under rent reserve payable quarterly. The defendant had purchased the reversion from the landlord. No rent fell due until January following, after service of process. In the meantime the defendant's property was assigned in bankruptcy. It was held that the rent not being due followed the reversion and passed with it to the assignee and that the garnishees were not liable. *Evans v. Hamrick*, 61 Pa. St. 19.

attaching creditors of the assignor, and against all others except those who have superior equities.¹

§ 537. (d) Same—Assigned choses in action can not be reached by assignor's creditors.—Choses in action other than negotiable instruments,² which, without fraud, have been equitably assigned, are no longer the property of the assignor, and therefore can not be garnished at suit of the assignor's creditors. And the fact that the assignee can not, in many states, maintain an action at law, but must sue in the name of the assignor, does not effect the rule; the garnishing creditor can stand on no better footing than his debtor, and the assignor has lost control over it.³ The effect of the common law rule, compelling the assignee to sue in the name of the assignor, is, that the assignee takes the chose in action subject to all the equities existing between the original parties at the time of the

1. *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. Rep. 107; *Haas v. Old Nat. Bank*, 91 Ga. 307, 18 S. E. Rep. 188; *Carr v. Waugh*, 28 Ill. 418; *Ives v. Addison*, 39 Kan. 172; *Neil v. Tenney*, 42 Me. 322; *Bishop v. Holcomb*, 10 Conn. 444; *Jackson v. Burgott*, 10 Johns. (N. Y.) 457.

A keeper of a boarding house made an agreement with a railroad company whereby the bills due from the employers were to be deducted from their pay and forwarded to the boarding house keeper each month. After this he procured a bank to advance money to him on the credit of the amount which was to fall due on the following pay-day, promising to turn the same over to the bank. The railroad company consented to transfer these payments to the bank. This arrangement was held to be an equitable assignment of such sums, vesting the title in the bank beyond the reach of process of garnishment at suit of the boarding house keeper's creditor and served upon the railroad com-

pany.. *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. Rep. 107.

2. Another rule applies to negotiable instruments, *post*, § 564 *et seq.*

3. *McKinney v. Alvis*, 14 Ill. 33; *Hackett v. Martin*, 8 Me. 77; *Bean v. Simpson*, 16 Me. 49; *Littlefield v. Smith*, 17 Me. 327; *Bartlett v. Pearson*, 29 Me. 9; *Gore v. Clisby*, 8 Pick. (Mass.) 555; *Providence County Bank v. Benson*, 24 Pick. (Mass.) 204, 210; *Gardner v. Hoeg*, 18 Pick. (Mass.) 168; *Dix v. Cobb*, 4 Mass. 508; *Spear v. Rood*, 51 Mich. 140; *Langley v. Berry*, 14 N. H. 82; *Muir v. Schenck*, 3 Hill (N. Y.) 228; *Raymond v. Squire*, 11 Johns. (N. Y.) 47; *Anderson v. Van Alen*, 12 Johns. (N. Y.) 343; *Raiguel v. McConnel*, 25 Pa. St. 362; *Stevens v. Stevens*, 1 Ashmead (Pa.) 190; *Canal Co. v. Insurance Co.*, 2 Phila. (Pa.) 354; *United States v. Vaughan*, 3 Binn. (Pa.) 394; *Caldwell v. Vance*, cited in 3 Binn. (Pa.) 400; *Corser v. Craig*, 1 Wash. (U. S. S. S.) 424; *Taylor v. Gillean*, 23 Tex. 508; *Mandeville v. Welch*, 5 Wheaton (U. S.) 277.

transfer;¹ but this does not subject him to "latent" equities. He must have express or constructive notice of them at the time of the assignment.²

1. *Faull v. Tinsman*, 36 Pa. St. 108; *Mangles v. Dixon*, 3 H. L. Cas. (Eng.) 702; *Life Ins. Society v. Polly*, 5 Jur. N. S. (Eng.) 129.

2. *Livingston v. Dean*, 2 Johns. Ch. (N. Y.) 479.

Book accounts come within the rule in Pennsylvania. *Raiguel v. McConnell*, 25 Pa. St. 362. But in Connecticut a book debt can not be assigned so as to make the debtor chargeable to the assignee without actual notice is given to the debtor. Until he receives actual notice of the assignment he is the debtor of the assignor and liable in garnishment as such. *Woodbridge v. Perkins*, 3 Day (Conn.) 364.

Property that has been transferred absolutely and in good faith by a public officer to secure his official bondsmen, is beyond the reach of process of garnishment. *Spear v. Rood*, 51 Mich. 140.

Proof of assignment.—Proof that an assignment has been made, is sufficient, without exhibiting the security or offering evidence of the assignment, where no request is made therefor. *Bean v. Simpson*, 16 Me. 49.

Parol assignment.—Where a debt is actually due under an existing contract it can, for a valuable and adequate consideration, be verbally assigned, and when so assigned will thereafter be beyond the reach of process of garnishment sued out by a creditor of the assignor. Such assignment transfers an equitable interest and this is protected by the law. *Porter v. Bullard*, 26 Me. 448; *Simpson v. Bibber*, 59 Me. 196; *Neuman v. Calumet & H. M. Co.*, 57 Mich. 97; *Prescott v. Hull*, 17 Johns.

(N. Y.) 284; *Panton v. Griffin*, 72 N. C. 362.

A note or bond may be assigned upon a valuable consideration by mere delivery to the assignee for his use. *Robbins v. Bacon*, 3 Me. 346.

Debt not due.—A debt which is not due may be effectually assigned so as to pass title at the time of the assignment and be valid against a subsequent attaching creditor. *Garland v. Harrington*, 51 N. H. 409; *Kane v. Clough*, 36 Mich. 436; *Weed v. Jewett*, 2 Metc. (Mass.) 608. As to an assignment of wages which must be in writing to protect them from garnishment in New Hampshire, see *Thompson v. Smith*, 57 N. H. 306.

A written order accepted is an assignment.—Where a debtor writes an order upon his creditor requesting him to pay to a third person a certain fund, it is an equitable assignment of the fund and will be protected against subsequent proceedings by garnishment. *Robbins v. Bacon*, 3 Greenl. (Me.) 346; *Conway v. Cutting*, 51 N. H. 407. And such an accepted order on a part of a fund amounts to a transfer to so much as is necessary to pay the order. *Montague v. Myers*, 11 Heisk. (Tenn.) 539.

A written order to an agent or attorney is not.—A written order from a client to his attorney instructing the latter to pay certain creditors certain moneys arising from certain claims when collected, the same being in his hands for collection, does not amount to an assignment of the claims or of the money collected upon them. Therefore, the ownership of the claim being unchanged, the claim may be

Choses in action may be the subject of garnishment in Illinois under a special statute, but they must be due and owing and must be of a legal and not a mere equitable character. They must be of such indebtedness as can be recovered in an action of debt or *indebitatus assumpsit* in the name of the principal debtor against the garnishee.¹

§ 538. (e) **Assignment binds garnishee though he have no notice till after service of process.**—A *bona fide* assignment of a debt, previous to the service of process of garnishment upon the debtor, compels the debtor to pay the assignee, although he have no notice of the assignment until after he is served with process of garnishment at suit of his former creditor—the assignor; that is to say, he can not be held as a debtor of the assignor although he have no notice of the assignment when the debt is garnished, if in fact the assignment was previously made.² A contrary rule has been applied in a few states, wherein it has been held that an assignment of a chose in ac-

reached by garnishment at suit of the client's creditors. *Sterrett v. Miles*, 87 Ala. 472; *Clark v. Cilley*, 36 Ala. 652; *Coleman v. Hatcher*, 77 Ala. 217; *Thweatt v. McCullough*, 84 Ala. 517.

1. *Webster v. Steele*, 75 Ill. 544.

2. *Walling v. Miller*, 15 Cal. 38; *Whitten v. Little*, Ga. Dec., Part II, 99; *Stephenson v. Walden*, 24 Iowa 84; *Norton v. Piscataqua Ins. Co.*, 111 Mass. 532; *Smith v. Sterritt*, 24 Mo. 260; *Knapp, Stout & Co. v. Standley*, 45 Mo. App. 264; *Schoolfield v. Hirsh*, 71 Miss. 55, 14 So. Rep. 528; *Sanborn v. Little*, 3 N. H. 539; *Stevens v. Stevens*, 1 Ashm. (Pa.) 190; *Tracy v. McCarty*, 12 R. I. 168; *Tazewell v. Barrett*, 4 Hening & Mun. (Va.) 259; *Miller v. Hubbard*, 4 Cranch Cir. Ct. 451.

The principal is applied to the assignment of an insurance policy in *Wakefield v. Martin*, 3 Mass. 558.

When recorded, as required by statute. *Hart v. Forbes*, 60 Miss. 745.

The principal applied to the assignment of a judgment in *Knapp, Stout & Co. v. Standley*, 45 Mo. App. 264, and *Schoolfield v. Hirsh*, 71 Miss. 55, 14 So. Rep. 528.

Erroneous judgment no protection.—Where a judgment is entered against the garnishee in such a case, it will not protect him against a subsequent recovery by the assignee who took title by assignment prior to the garnishment. *Funkhouser v. How*, 24 Mo. 44.

Unless answer appear at large on the record.—The garnishee, to protect himself in such a case, should have his answer entered at large on the record, and then, if the court decides erroneously, he can prosecute an appeal or writ of error to correct it. *Stockton v. Hall*, Hard. (Ky.) 160; *Marsh v. Davis*, 24 Vt. 363.

tion is not completed, so as to vest the title absolutely in the assignee, until notice of the assignment is given to the debtor; and that attachment in the time intervening between the actual assignment and the giving of notice to the debtor will take priority over the assignment.¹

§ 539. (f) **Notice prior to judgment necessary.**—Although process of garnishment will not reach money or property in the hands of the debtor where the same has been previously assigned by the creditor, even though the debtor had no notice of such assignment at the time he is served with the process; yet notice of the assignment must be given to him in time for him to bring the fact of the assignment to the attention of the court, by his answer or supplementary answer, before judgment is entered against him in the proceeding.² It must be actual notice given by a party to the proceeding and not simply information of the fact derived from a mere stranger.³ It must be such notice that the garnishee may be enabled to state the assignment as a fact.⁴ One case holds that the garnishee must not only have notice of the assignment of the fund in his hands belonging to the attachment defendant, but that the notice must be accompanied by evidence of the assignment, otherwise the garnishee will be bound to disclose the fact that he has such fund and the fund will be held by garnishment.⁵

1. *Robertson v. Baker*, 10 Lea (Tenn.) 300; *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330; *Penniman v. Smith*, 5 Lea (Tenn.) 130; *Brown v. Ayres*, 33 Cal. 525; *Succession of Risley*, 11 Rob. (La.) 298; *Golsan v. Powell*, 32 La. Ann. 521; *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. Rep. 134.

Record of assignment of wages.—That a debtor may be charged with notice of the assignment of wages to be earned in the future, statutes have been passed making it obligatory that such assignments be recorded in a record provided for that purpose. *Somers v. Keliher*, 115 Mass. 165; *O'Connor v. Cavan*, 126 Mass. 117;

Hatheway v. Reed, 127 Mass. 136; *Jason v. Antone*, 131 Mass. 534; *Eagan v. Luby*, 133 Mass. 543.

2. *Clark v. Few*, 62 Ala. 243; *Fanton v. Fairchild Co. Bank*, 23 Conn. 485; *Woodward v. Brooks*, 18 Ill. App. 150; *Smith v. Clarke*, 9 Iowa 241; *Stockton v. Hall*, Hard. (Ky.) 160; *Northam v. Cartright*, 10 R. I. 19; *Ward v. Morrison*, 25 Vt. 593.

3. *Peck v. Walton*, 25 Vt. 33; compare *Seward v. Heflin*, 20 Vt. 144.

4. *McAllister v. Brooks*, 22 Me. 80.

5. *Miner v. Kosek*, (Pa. Com. Pl.) 7 Kulp 72.

In Connecticut the rule is that notice must be given within a "reasonable

Notice of assignment given after judgment is rendered in the garnishment proceedings is wholly ineffective;¹ and, *a fortiori*, an assignment after garnishment will have no effect whatever towards passing title so as to defeat the attachment.²

§ 540. (g) Any notice sufficient before service of garnishment.—When a debt, fund or property has been assigned for a good and valuable consideration, and notice has been given to the debtor of that fact, the same is beyond the reach of the assignor's creditors by process of garnishment, no matter in what way the debtor was informed of the assignment. It is sufficient that he know that his creditor is divested of all his right to the debt assigned.³ A notice of assignment received by the

time." *Bishop v. Holcomb*, 10 Conn. 444; *Vanbuskirk v. Hartford F. I. Co.*, 14 Conn. 141.

In Rhode Island an assignment of wages to be earned in the future under an existing contract will take priority over a subsequent garnishment, if the garnishee have notice of the assignment in time to enable him to disclose it to the court and thus prevent himself from being charged as garnishee. *Tiernay v. McGarity*, 14 R. I. 231.

The practice.—Where a garnishee admits the debt to be owing from him or the property to be in his possession and alleges by his answer, or at any time before final judgment, that he has been notified that the third person claims the title to or an interest in the same, the court is bound to suspend proceedings against him, and in Alabama it must cause notice to be issued to the claimant to appear at the next term of court and contest with the garnishing creditor the right to the debt or property. When he appears he is required to propound his claim in writing under oath, and the creditor must take issue of law or fact thereon. The validity of the claim must be averred by the claimant and

the burden of establishing it rests upon him. *Clark v. Few*, 62 Ala. 243; *Scott v. Stallsworth*, 12 Ala. 25; *Camp v. Hatter*, 11 Ala. 151; *Brooks v. Hildreth*, 22 Ala. 469. Further as to "Issue on Answer," see *post*, § 651; and as to "Interpleader," *post*, § 671.

1. *Noble v. Thompson Oil Co.*, 79 Pa. St. 354.

2. *Shuler v. Bryson*, 65 N. C. 201; *Southern Md. R. Co. v. Moyer*, 125 Pa. St. 506, 23 W. N. C. 554, 17 Atl. Rep. 461; *Vermilyea v. Roberts*, 103 Mass. 410; *Reeve v. Smith*, 113 Ill. 47.

Where property was garnished and then assigned and afterwards attached by other creditors in Illinois, subsequent attaching creditors who obtain judgment at the same term of court with the original garnishing creditor took priority over the assignment. *Reeve v. Smith*, 113 Ill. 47.

3. *Manning v. Mathews*, 70 Iowa 303, 30 N. W. Rep. 749; *Bank of St. Mary v. Morton*, 12 Rob. (La.) 409; *Gillett v. Landis*, 17 La. 470; *Flint v. Franklin*, 9 Rob. (La.) 207; *Leahey v. Dugdale*, 41 Mo. 517; *Mowry v. Crocker*, 6 Wis. 326; *Newell v. Adams*, 1 D. Chip. (Vt.) 346.

A county treasurer was served with

debtor on Sunday is sufficient to make his debt payable to the assignee.¹

§ 541. (h) **Answer must show assignment.**—If the debt, contract or property on which it is sought to charge the garnishee has been assigned, the fact must be made to appear in the garnishee's answer, or, at least, before judgment is entered against the garnishee; for where the debtor has notice of the assignment and admits the debt without disclosing that fact, judgment will be entered against him. The assignee being a party to this suit, he will not be bound by any judgment entered in it; therefore, although judgment be entered against the garnishee and the garnishee may have satisfied the same, he will nevertheless be liable to the assignee in an action brought to recover the debt or property.²

§ 542. (i) **Assignees for benefit of creditors can not be made garnishees.**—In states providing for assignments by insolvents for the benefit of creditors it is a well established rule that a debtor in failing circumstances may make a deed of assignment of all his property to a certain person in trust for the benefit of all of his creditors and that the same being upon a good consideration will be valid in law, placing the title be-

process of garnishment in a suit against a railroad company. The treasurer answered that he had money in his hands as treasurer, which was part of a tax collected in aid of such railroad company; that prior to service of garnishment an assignment of all such taxes to a third party was filed in his office by the railroad company. It appeared over the signature of the attorney for the assignee of the taxes that the instrument of the assignment was a true copy of the original. It was held that this was a sufficient notice of the assignment of the funds in the hands of the treasurer, and the assignment was sufficiently proved by the introduction of the copy, no objection being made thereto. *Manning*

v. Mathews, 70 Iowa 303, 30 N. W. Rep. 749.

1. *Crozier v. Shants*, 43 Vt. 478.

2. *Davenport v. Woodbridge*, 8 Greenl. (Me.) 17; *Bunker v. Gilmore*, 40 Me. 88; *Larrabee v. Knight*, 69 Me. 320; *Andrews v. Ludlow*, 5 Pick. (Mass.) 28; *Foster v. Sinkler*, 4 Mass. 450; *Tabor v. Van Vranken*, 39 Mich. 793; *Page v. Thompson*, 43 N. H. 373; *Marsh v. Davis*, 24 Vt. 363.

In Minnesota the payment of a judgment in garnishment, in which the garnishee did not set up an assignment of which he had notice, has been held to be a good defense in a subsequent suit thereon by the assignee. *Dodd v. Brott*, 1 Minn. 270.

yond revocation by the assignor and beyond the reach of dissenting general creditors by process of garnishment or otherwise, while the property remains in the hands of the assignee as such.¹

The insolvency, however, that frustrates an ordinary process of law in favor of creditors, must be some legal form of insolvency by which the property of the debtor is taken into the custody of the law to be administered for the benefit of all concerned.²

1. *Flournoy v. Lyon*, 62 Ala. 213; *Daniels v. Meinhard*, 53 Ga. 359; *Kimball v. Mulhern*, 15 Ill. 205; *Houston v. Nowland*, 7 Gill & J. (Md.) 480; *Oliver v. Smith*, 5 Mass. 183; *Colby v. Coates*, 6 Cush. (Mass.) 558; *Dewing v. Wentworth*, 11 Cush. (Mass.) 499; *Grocers' Bank v. Simmons*, 12 Gray, (Mass.) 440; *Watkins v. Otis*, 2 Pick. (Mass.) 88; *McLean v. Rankin*, 3 Johns. (N. Y.) 369; *Lord v. Meachem*, 32 Minn. 66; *Schlueter v. Raymond*, 7 Neb. 281; *Miller v. Black*, 1 Pa. St. 420; *Waldron v. Wilcox*, 13 R. I. 518; *Huffman Implement Co. v. Templeton*, (Tex. App.) 14 S. W. Rep. 1015; *In re Chisholm*, 4 Fed. Rep. 526; *Torrens v. Hammond*, 10 Fed. Rep. 900.

Where the assignor in such a case became a trustee by having indorsed a note out of a specific fund, it was held that his subsequent assignment for the benefit of creditors did not pass title to such fund to his assignee. *McMenomy v. Ferrers*, 3 Johns. (N. Y.) 71.

Contra, execution creditor.—An execution creditor is not bound by a deed of trust made for the benefit of creditors. *Haust v. Burgess*, 4 Hughes Cir. Ct. 560.

2. *Reed v. Penrose*, 2 Grant (Pa.) Cas. 472, 36 Pa. St. 214.

Void assignment ineffective.—An assignment made under a law which is

rendered void by having been repealed will be unavailing, and the property in the hands of the trustee may be charged by process of garnishment at suit of the assignor's creditors. *Lewis v. Latner*, 72 Me. 487; *Kimball v. Evans*, 58 Vt. 655.

Avoidable assignment for the benefit of creditors does not prevent a creditor, not a party to it, from attaching the fund by process of garnishment. *Wyles v. Beals*, 1 Gray (Mass.) 233; *Edwards v. Mitchell*, 1 Gray (Mass.) 239.

When an assignee, under a voidable assignment, sells the assigned property and takes notes therefor, payable in the future, process of garnishment will not secure the same before the notes are payable. *Hopkins v. Ray*, 1 Metc. (Mass.) 79. *Contra*, under statutes permitting the garnishment of debts not due.

When required to be recorded.—An assignment for the benefit of creditors which is not recorded, will have no effect and the assignor's creditors may still attach the fund. *Watson v. Bagaley*, 12 Pa. St. 164.

Assignee's answer in garnishment.—When an assignee for the benefit of creditors is made a garnishee, he must show by his answer that the property or fund which has been attached is wanted to answer the valid purpose of the assignment or he will

An assignee, for the benefit of creditors, can not be held as a garnishee until the assignment is first impeached.¹ And although an assignment may be invalid in law, yet if the assignee, without fraud, has paid the full value for the effects received he can not be held as a garnishee.²

When, however, a fund has been deposited for the payment of some of the creditors only, without specifying which, the fund may be secured by garnishment served before the money is paid over.³

§ 543. (j) **Assignment made in another state.**—It is a rule of law generally recognized that a voluntary assignment of personal property, by a debtor for the benefit of his creditors, will, if recognized as valid in the state in which it is executed, be held to be effective in another state where property of the assignor is situate; if it do not contravene any law or policy of that state, and provided seasonable notice be given thereof, so that the debtor may know to whom the property or fund is owing. Therefore, one having such fund or property, can not be held as a garnishee at suit of a creditor of the assignor.⁴

§ 544. (k) **Assent of creditor—Necessity and effect thereof.**—Since a creditor, for whose benefit an assignment purports to have been made, is not obliged to accept the proffered “benefit” when he is not a party to the assignment, it follows that his rights under the contract existing between him and the assignor are not cut off unless he in some way recognizes the assignment or by laches is prevented from asserting the same.⁵

- be charged. *Borden v. Sumner*, 4 11 Gray (Mass.) 37; *Cragin v. Lamkin*,
Pick. (Mass.) 265. 7 Allen (Mass.) 395; *Daniels v. Wil-*
1. *Hecht v. Green*, 61 Cal. 269. lard, 16 Pick. (Mass.) 36; *Burlock v.*
2. *Emerson v. Wallace*, 20 N. H. Taylor, 16 Pick. (Mass.) 335; *Williams*
567. *v. Ingersoll*, 89 N. Y. 508; *Russell v.*
3. *Burger v. Burger*, 135 Pa. St. 449, Tunno, 11 Rich. Law (S. C.) 303; *Fisk*
19 Atl. Rep. 1073, 26 W. N. C. 355. *v. Brackett*, 32 Vt. 798.
4. *Vanbuskirk v. Hartford Fire Ins.*
Co., 14 Conn. 583; *Princeton Mfg. Co.*
v. White, 68 Ga. 96; *Martin v. Potter*, 5. *Copeland v. Weld*, 8 Me. 411;
Dehner v. Helmbacher, etc., Mills, 7
Ill. App. 47; *Ward v. Lamson*, 6 Pick.

The acceptance of proceeds from an assignee, however, binds the acceptor to the assignment. After a creditor has taken his portion of the proceeds of the assigned property in discharge of the debt owed to him by the assignor, if a greater amount should come in the hands of the assignee, a creditor not a party to the assignment can not reach the excess by process of garnishment.¹

§ 545. (1) **Garnishment will reach surplus only.**—Where a deed of assignment is made for the benefit of certain preferred creditors, any surplus fund which remains in the trustee's hands after the completion of the trust created by the deed of assignment may be reached at suit of the assignor's other creditors. This is true if the deed of trust be a valid one, but if such assignment be invalid because executed with intent to defraud, hinder, or delay, then the attaching creditors are not limited to the surplus, but may garnish the entire fund. And where a general assignment is made for the benefit of creditors, any dissenting creditor may reach the balance by garnishment.²

§ 546. (m) **Garnishment efficient when assignment fraudulent.**—When a deed of assignment for the benefit of creditors,

(Mass.) 358; *Viall v. Bliss*, 9 Pick. (Mass.) 13; *Foster v. Saco Man. Co.*, 12 Pick. (Mass.) 451.

Rule applied to insurance policy.—A policy of insurance providing that no assignment will be valid "unless consent of the insurers be first obtained," makes such consent necessary, and without such consent the assignee gets no title therein, although the insurance be "for account of whom it may concern, loss, if any, payable to assured or order." *Insurance Co. of Pennsylvania v. Phenix Ins. Co.*, 71 Pa. St. 31.

1. *Leland v. Drown*, 12 Gray (Mass.) 437.

2. *Hughes v. Sprague*, 4 Ill. App. 301; *Jones v. Gorham*, 2 Mass. 375;

Decoster v. Livermore, 4 Mass. 101; *Darling v. Andrews*, 9 Allen (Mass.) 106; *New England Ins. Co. v. Chandler*, 16 Mass. 275, 280; *Borden v. Sumner*, 4 Pick. (Mass.) 265; *Foster v. Saco Man. Co.*, 12 Pick. (Mass.) 451, 454; *Bradford v. Tappan*, 11 Pick. (Mass.) 76, 78; *Massachusetts National Bank v. Bullock*, 120 Mass. 86; *Douglas v. Simpson*, 121 Mass. 281; *Everett v. Walcott*, 15 Pick. (Mass.) 94, 97; *Warren v. Sullivan*, 123 Mass. 283; *Horne v. Stevens*, 79 Me. 262, 9 Atl. Rep. 616; *National Exchange Bank v. McLoon*, 73 Me. 498; *Leeds v. Sayward*, 6 N. H. 83; *Simon v. Ash*, 1 Tex. Civ. App. 202, 20 S. W. Rep. 719; *Warder v. Baker*, 67 Wis. 409, 30 N. W. Rep. 932.

or other assignment in writing, or by parol, is fraudulent, then no title to the fund or property sought to be conveyed has been so conveyed, and consequently such assignment will have no more effect upon a process of garnishment than if no effort had been made toward a transfer. In fact, where the assignment or conveyance is fraudulent garnishment is a proper remedy. If the plaintiff believe an assignment to be fraudulent the assignee in possession may be made a garnishee and be compelled to make a disclosure on oath upon the penalty of paying the debt in default thereof.¹

It is not necessary that the fraudulent assignee be made a garnishee. It may be done for the purposes above indicated, but a debtor's fraudulent assignment may be treated as a nullity and the person made a garnishee who, by the terms of the assignment, would be indebted to the assignee.² If the garnishee shows by his answer that his indebtedness to the defendant has been assigned and that he was notified before service of process, and the plaintiff desire to dispute the validity of the assignment, it is proper, if not necessary, that the assignee be brought before the court.³

When a supposed debtor has been made a garnishee and dis-

1. *Jaseph v. People's Sav. Bank*, 132 Ind. 39, 31 N. E. Rep. 524; *Bibb v. Smith*, 1 Dana (Ky.) 580; *Dix v. Cobb*, 4 Mass. 508; *How v. Field*, 5 Mass. 390; *Gordon v. Webb*, 13 Mass. 215; *Hastings v. Baldwin*, 17 Mass. 552, 558; *Burlingame v. Bell*, 16 Mass. 318, 320; *Mansard v. Daley*, 114 Mass. 408; *Gumberg v. Trench*, (Mich.) 61 N.W. Rep. 872; *Lee v. Tabor*, 8 Mo. 322; *Taylor v. Gillelan*, 23 Tex. 508; *Keep v. Sanderson*, 12 Wis. 352.

An attaching creditor has a right to call for proof of the consideration of an assignment which is opposed by him, and, when the proof of that consideration is incomplete, he may avail himself of the defect. *Maher v. Brown*, 2 La. 492.

When an assignee under a fraudu-

lent and voluntary assignment is summoned as a garnishee of the assignor, he can not escape on the ground that he gave his own promissory notes in consideration of the assignment and paid the same after service of the process to an endorsee who took part in the fraud. His liability under the circumstances is the legitimate result of his own laches. *Potter v. Stevens*, 40 Mo. 591.

2. *Prentiss v. Danaher*, 20 Wis. 311.

3. *Cadwalader v. Hartley*, 17 Ind. 520.

The mere fact that the garnishee in his answer shows that he has received notice of an assignment of the fund should not discharge him when the good faith of the assignment is questioned. *Hanaford v. Hawkins*, (R. I.) 28 Atl. Rep. 605.

closes an assignment, and it is desired to bring the assignee in by summons of garnishment, it must be done before the case has been argued and presented to the court for a final decision upon the disclosure alone. A motion made at that stage of the case comes too late.¹ Where an answer discloses an assignment, valid in form, which may be fraudulent, the assignee must, in Maine, be brought in, otherwise the court can not declare the assignment fraudulent, although the facts disclosed may justly create a strong suspicion.²

Fraud that will defeat an assignment is not alone a fraudulent intent on the part of the assignor to defeat his creditors, but it must be shown that the assignee, who is made a garnishee, participated in the fraud.³ When the assignee, conspiring with the assignor to defraud the latter's creditors, may have disposed of the property at the time he was served with process of garnishment, yet he may be held liable for the value of the property with interest thereon from the day he appropriated it to his own use.⁴

1. *Johnson v. Thayer*, 17 Me. 401.

2. *Johnson v. Thayer*, 17 Me. 401.

3. *Troxall v. Applegarth*, 24 Md. 163.

If, in good faith, he took the assignment and performed his part of the agreement by paying the price or discharging the debts agreed upon, he can not be charged as garnishee. *Troxall v. Applegarth*, 24 Md. 163; *Hutchins v. Sprague*, 4 N. H. 469.

4. *Risser v. Rathburn*, 71 Iowa 113, 32 N. W. Rep. 198.

Assignee not chargeable for what he has not received.—An assignee can not be held liable as for fraud because of allowing the debtor to keep out of the assignment money owned by him, because such money never came into the assignee's hands. *Cleveland Co. Op. Stove Co. v. Wilson*, (Iowa) 45 N. W. Rep. 897.

A transfer was made of personal property, but the assignee never took it

made with intent to defraud a party into his possession or exerted any control over it. The plaintiff caused process of garnishment to be served upon the assignee, claiming that the purchase was without consideration and void, made for the purpose of defrauding creditors. A judgment for the value of the property was entered in the court below, but was set aside in the court above. *Kiggins v. Woodke*, 78 Iowa 34, 34 N. W. Rep. 789, 42 N. W. R. 576.

Not liable where contract fraudulent, if goods afterward paid for.—If vendor and vendee make a fraudulent contract, and the vendee thereafter, and, before service of process of garnishment, on the order of the vendor, pay debts of the latter to the value of the property, garnishment will not lie. *Thomas v. Goodwin*, 12 Mass. 140.

Assignment fraudulent as to particular creditor.—An assignment was

§ 547. **When effects held by a receiver.**—When a receiver has been appointed by a court of competent jurisdiction, and has qualified as such, any fund or property held by him in his ministerial capacity is in the custody of the court, and it is a well settled rule of law that he can not be sued without leave of court which appointed him. Therefore assets in the hands of a receiver are beyond the reach of a process of garnishment because the same are in *custodia legis*.¹ But a receiver appointed to wind up the affairs of a firm may, when a surplus remains in his hands after the termination of affairs, be held as a garnishee for such surplus belonging to the individual member of the firm.²

However, in the absence of statutory provision, a receiver is amenable to process of garnishment when such process does not tend to disturb any rights under the general orders of the appointing court. Therefore where a corporation is in the hands of a receiver, he is the proper person to be served with process of garnishment to reach a debt or effects which the corporation owed or held.³ Furthermore, and because effects

ticular creditor. The assignee made payments to such creditor before service of process upon him. The garnishment proceeding was instituted by that particular creditor against the assignee seeking to charge him with such payments made in violation of his duty as assignee. There was no recovery. *Stickney v. Crane*, 35 Vt. 89.

1. *Field v. Jones*, 11 Ga. 413; *Jackson v. Lahee*, 114 Ill. 287; *McGowan v. Myers*, 66 Iowa 99; *Nelson v. Conner*, 6 Rob. (La.) 339; *People, ex rel. Tremper, v. Brooks*, 40 Mich. 333; *Cooney v. Cooney*, 65 Barb. (N. Y.) 524; *Taylor v. Gillean*, 23 Tex. 508; *Hagedon v. Bank of Wisconsin*, 1 Pinney (Wis.) 61; *ante*, §46. See, also, as to "Public Officers" generally, §§ 505-509.

That property and effects of a bank

are in the custody of the law after the appointment of a receiver, although he may not have reduced them to actual possession, see *Hagedon v. Bank of Wisconsin*, 1 Pinney (Wis.) 61.

2. *Willard v. Decatur*, 59 N. H. 137.

3. *Phelan v. Ganabin*, 5 Colo. 14.

The receiver of a railway company may be garnished for the earnings of such railway company. *First Nat. Bank v. Portland & O. Ry. Co.*, 2 Fed. Rep. 831.

An equitable custodian of a fund, not in actual possession thereof, may be made a garnishee for a debt of the equitable owners. *County of Des Moines v. Hinkley*, 62 Iowa 637.

Receiver of public moneys.—A fund collected and in the hands of a receiver of public moneys in New Orleans was held not to be the property

in the hands of a receiver are only in custody of law when they are held by him in his capacity as receiver, he may be held liable as garnishee where the effects are held in violation of his rights as receiver,¹ and when, for any other reason, the fund or property is held by him in another capacity than that of receiver; as, for example, where a fund was offered to him, he protesting that he had no right to receive it, and where the fund, being left on his table, he took care of the same, he was thereafter properly made a garnishee.²

Under some statutes, when a fund or property is secured by process of garnishment, a receiver is specially appointed to take charge and dispose of the same.³

of one who is entitled to a portion thereof until the same was paid over to him, and consequently could not be reached in the hands of such receiver by process of garnishment. *Mechanics', etc., Bank v. Hodge*, 3 Rob. (La.) 373.

1. *Glenn v. Boston, etc., Co.*, 7 Md. 287.

2. *Morse v. Holt*, 22 Me. 180.

3. *Netter v. Chicago Board of Trade*, 12 Ill. App. 607; *Hills v. Smith*, 19 N. H. 381.

CHAPTER XXVI.

EFFICIENCY OF GARNISHMENT—CONTINUED.

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| <p>§ 548. When applied to agents or servants. (a) General rules.</p> <p>549. (b) Agent charged to perform special acts.</p> <p>550. (c) Sub-agent not liable—
Must be both privity of contract and privity of interest.</p> <p>551. (d) Agent casually within the state not liable.</p> <p>552. (e) Possession by agent makes principal liable as garnishee.</p> <p>553. When applied to attorneys.</p> <p>554. Same—Attorney for plaintiff should not be a garnishee.</p> <p>555. When applied to employer.
(a) Wages and salary generally.</p> <p>556. (b) Not when wages or salary assigned.</p> <p>557. (c) Not for wages exempt by statute.</p> <p>558. (d) Who is a "laborer" and what is "wages" within the meaning of the law.</p> <p>559. (e) Non-resident laborers entitled to exemption.</p> <p>560. (f) Garnishee must claim exemption for laborer.</p> <p>561. (g) Exemption may be defeated by claim for necessities.</p> <p>562. When debt evidenced by note or bill—Generally.</p> | <p>§ 563. As to non-negotiable instruments.</p> <p>564. As to negotiable instruments.
(a) Rule requiring them to be owned by the payee.</p> <p>565. (b) Rule requiring them to be due.</p> <p>566. (c) Rule not requiring them to be due.</p> <p>567. (d) Effect of assignment upon garnishee.</p> <p>568. (e) Effect of indorsement upon garnishee.</p> <p>569. (f) Effect of notice to the maker—the garnishee.</p> <p>570. (g) Must be payable in money.</p> <p>571. (h) Must be payable in the state.</p> <p>572. (i) Must not be due upon contingency.</p> <p>573. (j) Notes held as collateral security.</p> <p>574. As to accepted drafts.</p> <p>575. As to corporate bonds.</p> <p>576. A mere custodian of a note or bill can not be held as a garnishee.</p> <p>577. When contract of bailment exists. (a) Accommodation bailees.</p> <p>578. (b) Bailees for hire.</p> <p>579. When funds deposited in bank.
(a) Generally.</p> <p>580. (b) When deposited by one as "Agent" or other fiduciary.</p> |
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- § 581. (c) As to funds transferred to a bank as collateral security.
582. (d) As to checks drawn before service and presented after.
583. When funds placed in safety deposit vaults.
584. When debt secured by mortgage, or property held as indemnity. (a) Generally.
585. (b) Surplus only can be reached.
- § 586. (c) Only when possession taken.
587. (d) In case mortgage invalid.
588. Fraudulent vendee in possession.
589. When directed against a judgment-debtor.
590. When suit pending between principal defendant and garnishee.

§ 548. When applied to agents or servants—(a) General rules.—In determining whether or not an agent or servant may be held as a garnishee in a suit against his principal or master, the courts apply a rule which is somewhat metaphysical and which is drawn upon a line that is not easily distinguished in the every day affairs of life. Primarily it is a universal rule of law that the defendant in a suit can not be also a garnishee in that suit. Then, since by another rule of law the possession of the servant is the possession of the master, it follows that to garnish a fund or property in the hands of a servant of a defendant would be to garnish it in the hands of the defendant; consequently it may be said that as a general rule a servant can not be made a garnishee in a suit against his master.¹

The above rule applies so long as the servant owes a duty

1. *Hall v. Filter Mfg. Co.*, 10 Phila. (Pa.) 370; *Flanagan v. Wood*, 33 Vt. 332; *Fowler v. Pittsburgh, etc., Ry. Co.*, 35 Pa. St. 22; *Pettingill v. Androscoggin Ry. Co.*, 51 Me. 370; *Bean v. Bean*, 33 N. H. 279; *Casey v. Davis*, 100 Mass. 124; *Gage v. Stimson*, 26 Minn. 64.

An agent for collection, only, can not be made a garnishee. *Gage v. Stimson*, 26 Minn. 64. In *Colorado a debtor's agent who has collected money can not be held as a garnishee because the statute limits the liability of the garnishee (in a justice' court) to debts or property for which he*

would otherwise be liable to the defendant. *Voorhies v. Denver Hardware Co.*, 4 Colo. App. 428, 36 Pac. Rep. 65.

An auctioneer, acting under the special directions of the debtor in the sale of the latter's property, can not be held as a garnishee at suit of a creditor of the debtor. *Penniman v. Ruggles*, 6 Mass. 166; *Nat. Bank of Missouri v. Staley*, 9 Mo. App. 146; *Fenton v. Block*, 10 Mo. App. 536; *Pratte v. Scott*, 19 Mo. 625; *contra, Vanderhoof v. Holloway*, 41 Minn. 498, 43 N. W. Rep. 331.

and not a debt to the master, but when the relation of debtor and creditor exists then the ordinary rule governing such cases applies, and the servant or agent may be garnished in a suit against the master or principal as the case may be.¹ This logic may be good, but the difficulty comes in establishing the distinction so as to make practical its application.²

The same rule applies to corporations except that courts are, possibly, more inclined to hold that the agent of a corporation, having a fund in his hand, is a debtor of such corporation than they would be in like cases of agents of individuals and therefore more inclined to sustain the garnishment. An agent of a foreign life insurance company, having executed a policy of insurance on which a loss is supposed to have arisen payable to the debtor, has been held as a garnishee of the company.³ So has a toll-gate keeper of an incorporated plank road company.⁴ And also a railway station agent who has collected money from the sale of tickets.⁵

1. *Ante*, § 476.

2. One who has been paid in advance for services which he has agreed to render, owes a duty and not a debt, and therefore can not be held as garnishee at suit of his employer's creditor. *Boyd v. Brown*, 120 Ind. 393, 22 N. E. Rep. 249.

Where a banker absconded, his clerk having custody of funds and notes was held as garnishee in an action begun by a creditor. *Nolte v. Von Gassy*, 15 Ill. App. 230.

Agent holding moiety.—An agent after having sold real estate which had been owned by husband and wife as tenants by entireties was held liable as a garnishee for the husband's moiety in an action brought by the husband's creditor to recover the husband's debt. *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. Rep. 909.

Agent's liability measured by principal's liability.—Where the garnishee is an agent of one having only a

partial interest in the fund (as a factor) the agent is only liable in such garnishment for the amount of his own principal's interest. *Titcomb v. Seaver*, 4 Me. 542; *ante*, § 474.

Agent holding pension money.—By act of congress, sums of money due to pensioners is exempt from attachment while in the course of transmission or in the hands of a United States pension agent and is also free from liability while in the hands of the pensioner's agent appointed to receive it from the disbursing agent. *Adams v. Newell*, 8 Vt. 190; *Kellogg v. Waite*, 12 Allen (Mass.) 529.

3. *Wells v. Greene*, 8 Mass. 504.

4. *Central Plank Road Co. v. Sammons*, 27 Ala. 380.

5. *Littleton Bank v. Portland & Ogdensburgh R. R. Co.*, 58 N. H. 104; *contra*, *Pettingill v. Androscoggin Ry. Co.*, 51 Me. 370; *Fowler v. Pittsburgh, etc., Ry. Co.*, 35 Pa. St. 22.

Money belonging to a municipal

§ 549. (b) **Agent charged to perform special acts.**—It has been generally (but not always) held that where an agent is charged with special application of the fund or property he can not be charged by process of garnishment so as to affect his special duties. In one sense there has, in such case, been an equitable assignment which will be protected,¹ and in another sense the agent may have become the agent of third parties.²

corporation in the hands of a collector is not subject to garnishment. *Moore v. Chattanooga*, 8 Heisk. (Tenn.) 850; but he is a public officer and another rule applies. *Ante*, § 503.

1. *Ante*, § 536.

2. *Tevis v. Foster*, 3 Greene (Iowa) 71; *Bowles v. Graves*, 4 Gray (Mass.) 117; *Fuller v. Jewett*, 37 Vt. 473; *Haust v. Burgess*, 4 Hughes Cir. Ct. (U. S.) 560.

An agent who is empowered to collect money due a mercantile firm and to apply the amounts collected *pro rata* to the creditors of the firm, can not be made a garnishee so as to affect his duty to apply the fund as directed. *Haust v. Burgess*, 4 Hughes Cir. Ct. (U. S.) 560.

But where an agent is directed by his principal to pay the principal's debt to one creditor the agent may be made a garnishee at suit of another creditor, and the garnishment will relieve the agent of any liability to the first creditor. *Center v. McQuesten*, 18 Kan. 476.

An agent who receives his principal's money for the purpose of investment and invests it in notes of third parties, can not be made a garnishee for the amount of such notes. *Fuller v. Jewett*, 37 Vt. 473.

An agent in possession of goods and effects of the defendant who is acting as agent for *bona fide* preferred credit-

ors, can not be held as a garnishee in a suit against the defendant. *Tevis v. Foster*, 3 Greene (Iowa) 71.

But one who is directed by his principal to make a certain application of the fund of another does not become the agent of the other merely because he assumes to be. The other must have notice and consent to the service. *Town v. Griffith*, 17 N. H. 165. Where the third person has no knowledge thereof, the agent may be charged as a garnishee, although he be on his way to make the payment when process of garnishment is served upon him. *Center v. McQuesten*, 18 Kan. 476.

An agent who is directed to collect money and pay a certain creditor and who pays it contrary to directions may be held liable in garnishment sued out by other creditors of the principal. *Felch v. Eau Pleine Lumber Co.*, 58 Wis. 431.

An agent authorized by a debtor to compromise with creditors for a certain proportion of their debts, and who has received the debtor's property to be sold and converted into money for that purpose, can not be made a garnishee at suit of a dissenting creditor for any money which he has paid out pursuant to the compromise, nor for money in his possession held by him as an agent of a consenting creditor, nor for any amount which

An agent being in possession of a fund which his principal has assigned can not be made a garnishee in a suit against the principal because he is not, as to that fund, an agent of the assignee.¹

§ 550. (c) Sub-agent not liable—Must be both privity of contract and privity of interest.—It is often said that there must not only be privity of interest between the garnishee and the defendant, but that there must be privity of contract between them as well, and under this rule it is held that one who has collected a fund due to a trustee is not liable to process of garnishment for a debt against the beneficiary, although the trustee himself might have been so liable. The agent's contract is not with the principal defendant, but with the trustee.² And for the same reason an agent of an agent can not be held as a garnishee in a suit against the principal, although the agent himself might have been. The sub-agent can not be held liable to the individual indebtedness of the agent.³

he still holds payable to consenting creditors who have already discharged their debts, but he is chargeable as garnishee for other moneys of the debtor still in his hands. *Bowles v. Graves*, 4 Gray (Mass.) 117.

As to an ineffectual effort to make a contractor an "agent" so as to prevent his liability to process of garnishment, see *Hart v. Rafter*, 78 Ga. 478, 3 S. E. Rep. 699.

For a consideration of whether a committee of a religious society who have let a contract for the building of a meeting house can be made garnishees, because of individual liability, or only as agents of the society, see *Hewitt v. Wheeler*, 22 Conn. 557; *Hewitt v. Wheeler*, 23 Conn. 284.

Agent instructed specially, holding a fund as security for compensation.—Where an agent has been charged with the performance of special duties,

and in security for his compensation therefor a fund is deposited with him, he can not be made a garnishee, although at the time of the service of process a balance might be due to his principal. *Poe v. St. Mary's College*, 4 Gill. (Md.) 499.

1. *Johnson v. Pace*, 78 Ill. 143.

Notice to the general agent of an insurance company of the assignment of a claim against the company is sufficient to make the assignment effectual against a process issued in a suit against the assignor, but notice to a local agent or to insurance commissioners, is not. *Weed Sewing-Machine Co. v. Boutelle*, 56 Vt. 570.

2. *McIlvane v. Lancaster*, 42 Mo. 96.

3. *Granite Nat. Bank v. Neal*, 71 Me. 125; *Burrell v. Letson*, 1 Strobb. (S. C.) 239; *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 254.

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§ 551. (d) **Agent casually within the state not liable.**—An agent of a foreign corporation casually within the state, but doing business without it, can not be made a garnishee of the company, although he live within the state and there audited and approved and sometimes paid claims growing out of business transacted in adjacent states.¹

§ 552. (e) **Possession by agent makes principal liable as garnishee.**—Since a fund or property in possession of an agent is in possession of the principal, it follows that when a fund or property is placed in the hands of an agent by a third person, the principal is, by such possession, rendered liable as a garnishee in a suit against the same person.² But where, without neglect, the agent, without notice or knowledge of the fact of the garnishment upon the principal, applies the fund or property as previously directed, he is not chargeable as a garnishee for the amount so paid.³

§ 553. **When applied to attorneys.**—The general rules of law applicable to agent and principal are also applicable to attorney and client, but the special adjudication of cases relating to attorneys may be found convenient.

It seems that, by the custom of London, from which our garnishment proceedings were modeled,⁴ that an attorney was amenable to process of garnishment for the fund in his possession belonging to his client.⁵ And in our own country, although an attorney is an officer of the court, he is not such a public officer as to be exempt from liability on process of garnishment. Therefore an attorney may be made a garnishee in

1. Schmidlapp *v.* LaConfiance Ins. Co., 71 Ga. 246; also, Wells *v.* Greene, 8 Mass. 504.

An agent of an insurance company in the state for the purpose of service of process can not be made garnishee by a resident plaintiff for a debt of the non-resident company to the non-resident defendant. Everett *v.* Walker, (Colo. App.) 36 Pac. Rep. 616.

For the rule regarding the *situs* of the debt, see *ante*, § 490.

2. McDonald *v.* Gillett, 69 Me. 271.

3. Spooner *v.* Rowland, 4 Allen (Mass.) 485.

4. *Ante*, § 465.

5. Turbill's Case, 1 Saund. (Eng.) 67; Ridge *v.* Hardcastle, 8 T. R. (Eng.) 417.

an action brought against the party for whose use the fund is held by him in his professional capacity, whether it came into his hands directly from his client or by collections made for him, or otherwise.¹ An attorney may be held liable as garnishee for a fund which he has collected for his client, the defendant, although such collection was made by suit.²

1. *Mann v. Buford*, 3 Ala. 312; *Tucker v. Butts*, 6 Ga. 580; *Lucas v. Campbell*, 88 Ill. 447; *White v. Bird*, 20 La. Ann. 188; *Staples v. Staples*, 4 Me. 532; *Burnell v. Weld*, 59 Me. 423; *Cook v. Holbrook*, 6 Allen (Mass.) 572; *Hooper v. Hills*, 9 Pick. (Mass.) 435; *Coburn v. Ansart*, 3 Mass. 319; *Thayer v. Sherman*, 12 Mass. 441; *Naramore v. Clark*, 63 N. H. 166; *Riley v. Hirst*, 2 Pa. St. 346.

Not when attorney exempt from service.—But it must be remembered that there are times when an attorney can not be served with process, as, for example, when he is in court. *Johns v. Allen*, 5 Harr. (Del.) 419.

Not when attorney has a lien for fees.—When an attorney has a lien upon the property in his hands for his compensation for services rendered in regard thereto, then such lien will take priority over the attachment and he will not be liable for anything more than whatever excess may remain in his hands after his lien is satisfied. *Crain v. Gould*, 46 Ill. 293; *Matheson v. Rutledge*, 12 Rich. (S. C.) 41; *post*, §§ 584, 585.

Not liable for exempt fund.—A fund in possession of an attorney arising from the sale of exempt real estate will also be exempt and can not be held by process of garnishment served upon him. *Gery v. Ehrgood*, 31 Pa. St. 329.

2. *Mann v. Buford*, 3 Ala. 312.

When future indebtedness not attachable.—In states where a debt to become due can not be reached by process of garnishment, an attorney can

not be held as a garnishee for a fund which he has not yet recovered. Therefore where an attorney has in his hands notes or other claims for collection, he can not be held as a garnishee before the money represented by such notes or demands is collected. *Fitch v. Waite*, 5 Conn. 117; *White v. Bird*, 20 La. Ann. 188; *Mayes v. Phillips*, 60 Miss. 547; *Howland v. Spencer*, 14 N. H. 580; *Hitchcock v. Egerton*, 8 Vt. 202.

Where a future indebtedness attachable.—Where, however, an indebtedness to become due in the future can be secured by process of garnishment, an attorney may be held liable as a garnishee for a fund collected by him after service of process upon him and before answer and judgment thereon. *Howland v. Spencer*, 14 N. H. 530; *Hulburt v. Hicks*, 17 Vt. 193.

Not where he has collected coin or specific property in satisfaction of a debt.—It has been held that where an attorney at law, on a claim due his client, has collected coin he can not be held as a garnishee therefor because the coin was said not to be the property of the client until it was delivered to him, and until then the attorney's obligation to his client was but a chose in action. *Maxwell v. McGee*, 12 Cush. (Mass.) 137. It would seem that this rule would be applicable in cases where specific property, such as jewels or other chattels, are delivered to the collecting attorney in satisfaction of his client's debts.

An attorney is not liable as a garnishee in a suit against his client until an action at law would lie against him at suit of his client.¹ Therefore when a demand would be first necessary on the part of the client, the attorney can not be held as a garnishee before a demand is made upon him.²

An attorney can not be held liable as a garnishee in a suit against his client where the fund or property in the attorney's hands has been equitably assigned by the client.³ An attorney who is given choses in action to collect and apply, is not thereby made an assignee, nor are the creditors to whom it is to be applied made assignees, and therefore such claims, when attachable, are liable to process of garnishment served upon the attorney at suit of a client's creditor.⁴ Where, however, an attorney is in possession of a fund which, before he is served with process of garnishment, he had decided to apply to the satisfaction of certain judgments against his client on which executions had issued, he can not be held as a garnishee until the fund is first applied to the satisfaction of the older executions.⁵

§ 554. **Same—Attorney for plaintiff should not be garnishee.**—The attorney for the plaintiff in the action should not be a garnishee in the same action, because his consenting to

1. *Ante*, § 475.

2. *Staples v. Staples*, 4 Me. 532; *Woodbridge v. Morse*, 5 N. H. 519.

3. *Gerrish v. Sweetzer*, 4 Pick. (Mass.) 374; *Nesmith v. Drum*, 8 Watts & S. (Pa.) 9; *Connely v. Harrison*, 16 La. Ann. 41; *ante*, § 536.

What is such assignment.—A letter of attorney irrevocable, to receive a sum of money to the attorney's own use is *prima facie* an assignment, but it is capable of being explained by extraneous evidence. *Gerrish v. Sweetzer*, 4 Pick. (Mass.) 374.

An order drawn upon the fund in the hands of the attorney for collection is an equitable assignment thereof and the attorney can not thereafter be

held as garnishee in a suit against the drawer, even though an attorney does not accept the order. *Nesmith v. Drum*, 8 Watts & S. (Pa.) 9.

What is not an assignment.—On the contrary an order drawn upon a fund which may become due to the client from a pending suit, in which judgment has not been entered, does not change the character of such order so as to make it a valid assignment. It will not take precedence to process of garnishment. *White v. Coleman*, 130 Mass. 316.

4. *Sterrett v. Miles*, 87 Ala. 472, 6 So. Rep. 356; *Staples v. Staples*, 4 Me. 532.

5. *Carr v. Benedict*, 48 Ga. 431.

the entry of a judgment against him as garnishee upon his liability to his other client, might cause great injustice to his other client, the defendant, and might give ground for fraud and collusion between the attorney and the plaintiff; but it has been held in one case that where the attachment was made, indorsed and entered by the garnishee, who was the attorney for the plaintiff, no wrong being intended or contemplated, that such fact was not a cause for discharging the garnishee on the defendant's motion. The court, however, said that such practice would not be encouraged.¹

§ 555. When applied to employer—(a) Wages and salary generally.—The relationship of debtor and creditor is a necessary prerequisite in all actions in attachment, and it must not only exist between the plaintiff and defendant,² but it must exist between the defendant and the garnishee.³

Public officers, though they be employers, can not be held as garnishees,⁴ and this is for the reason that they are held not to be debtors, and that the fund in their possession for the payment of salaries does not belong to the employes until it is paid over to them.⁵

In ordinary cases of employment the relation of debtor and creditor exists as soon as services are rendered, for which the employer is bound to pay under their existing contract relations. Therefore an employer may be made a garnishee for whatever sum of money he owes to his employe for salary or wages when the same is not exempt by special statute.⁶ Wages or salaries which have been earned and are due and payable may be garnished in the hands of the employer at suit of an employe's creditor.⁷

1. *Kelley v. McMinniman*, 58. N. H. 288.

2. *Ante*, §§ 76 and 79.

3. *Ante*, §§ 475-483.

4. *Ante*, §§ 505-509.

5. *Bank of Tennessee v. Dibrell*, 3 Sneed (Tenn.) 378; *Oliver v. Ahtey*, 11 Lea. (Tenn.) 149; *Train v. Herrick*, 4 Gray (Mass.) 534; *Dewey v. Garvey*, 130 Mass. 86; *Robinson v. Aiken*, 39

N. H. 211; *Buchanan v. Alexander*, 4 How. 20; *Craft v. Summersell*, 93 Ala. 430, 9 So. Rep. 593. Compare *City Council of Montgomery v. Van Dorn*, 41 Ala. 505.

6. *Post*, § 557.

Who is the employer of a school teacher? Compare *Ross v. Allen*, 10 N. H. 96.

7. *Mines v. Pyle*, 4 Houston (Del.)

Wages may be paid in advance, and when they are paid before they are actually earned no debt accrues from the employer to the employe which is susceptible of being reached by garnishment.¹

When the wages are not due they can not be held by process of garnishment,² except in states permitting the attachment of

646; *Fitzsimmons v. Carroll*, 128 Mass. 401; *McKelvey v. South Carolina R. Co.*, 6 S. Car. 446; *Bishop v. Young*, 17 Wis. 46.

Employer not bound to give notice to employe.—Where an employer has been made a garnishee there seems to be no necessity that he should notify the employe. *Bolton v. Pennsylvania Co.*, 88 Pa. St. 261. But that he is compelled to claim the exemption for the employe, see *post*, § 629.

Where the employe is an agent.—If an employer hire one acting as agent, the money becomes due to the principal, though the employer did not know it, and hence the employer can not be held as a garnishee in an action against the agent. *Davis v. Willey*, 57 Vt. 125.

Wages of a minor.—Where a minor contracts for his service on his account in good faith, and his father knowing of it assents thereto or makes no objections, the wages are the property of the son and not of the father, and therefore can not be garnished by a creditor of the father. *Whiting v. Earle*, 3 Pick. (Mass.) 201; *Manchester v. Smith*, 12 Pick. (Mass.) 113, 115.

1. *Alexander v. Pollock*, 72 Ala. 137; *Callaghan v. Pocasset Mfg. Co.*, 119 Mass. 173; *Martin v. Gayle*, 2 Disney (Ohio) 86.

A contract to pay in advance may be fraudulent.—A husband in an effort to defeat the levy of an execution on a judgment which his wife had obtained against him for separate maintenance,

required his employers (one of whom had been the husband's friend for years, and advised him to protect himself against proceedings by garnishment) to pay his wages in advance. The wages were a considerable sum. The jury in the court below found such contract to be fraudulent, and the court above sustained the judgment. *Spengler v. Kaufman*, 46 Mo. App. 644.

2. *Burlington & Missouri River R. Co. v. Thompson*, 31 Kan. 180; *Wyman v. Hichborn*, 6 Cush. (Mass.) 264; *Warner v. Perkins*, 8 Cush. (Mass.) 518; *Martin v. Gayle*, 2 Disney (Ohio) 86; *Baltimore, etc., R. R. Co. v. Gallahue*, 14 Gratt. (Va.) 563; *Foster v. Singer*, 69 Wis. 392, 34 N. W. Rep. 395.

Where a workman was to be paid on the completion of work, or as soon as sufficient money should be obtained from the sale of lands fenced, which fencing was the labor done by the workman, the employer could not be held liable because he had received no money from the sale of land and because he had paid to the workman in advance more than sufficient to pay for the labor performed. *Warner v. Perkins*, 8 Cush. (Mass.) 518.

Salary due at the end of each month can not be garnished on the 28th day of that month, because the salary for that month is not "then due" nor "to become due" within the meaning of the statute. *Foster v. Singer*, 69 Wis. 392, 34 N. W. Rep. 395.

A minister's salary was payable

an indebtedness to become due.¹ But even in such cases, the law requires that there must be an existing debt;² hence money *earned* after service and before answer is not liable to the process of garnishment.³ Where there is any uncertainty that the wages will come due, or the amount thereof, such contingency will prevent garnishment from being efficient.⁴ Where the time at which the wages are to be paid is, by agreement,

quarterly with an agreement that if he entered upon a quarter and did not complete it nothing would be due for such services. In the middle of a quarter the minister resigned. His resignation was accepted. Process of garnishment was served upon the parish. The parish afterward voted to pay the minister *pro rata* for the time of his service after the commencement of the quarter. It was held that the parish was not liable as garnishee. *Wyman v. Hichborn*, 6 Cush. (Mass.) 264.

When no wages due to husband.—When a wife is a member of a firm and the husband simply represents his wife in the firm business, the firm owes him nothing for services which can be reached by garnishment. *Dupuy v. Sheak*, 57 Iowa 361.

1. *Seymour v. Over-River School District*, 53 Conn. 502; *Wilcus v. Kling*, 87 Ill. 107; *Bennett v. Caswell*, 7 Gray (Mass.) 153; *Telles v. Lynde*, 47 Fed. Rep. 912.

A monthly salary earned may be attached, although not yet payable. *Seymour v. Over-River School District*, 53 Conn. 502.

Fisherman's wages, payable "within" thirty days after the arrival of the vessel in port, may be secured by garnishment before the expiration of that time. *Telles v. Lynde*, 47 Fed. Rep. 912.

2. *Ante*, § 476.

3. *Bliss v. Smith*, 78 Ill. 359; *Thomas*

v. Gibbons, 61 Iowa 50; *Sanborn v. Ward*, 64 N. H. 611, 6 Atl. Rep. 27; *Tracy v. Bridges*, 2 Miles (Pa.) 352; *Foster v. Singer*, 69 Wis. 392, 34 N. W. Rep. 395; *Van Vleet v. Stratton*, 91 Tenn. 473, 19 S. W. Rep. 428.

For this reason a salary due for the month, payable at the end thereof, can not be garnished before the end of the month. *Foster v. Singer*, 69 Wis. 392, 34 N. W. Rep. 395.

Where it is a judgment debt that is the foundation of the garnishment, and that judgment is for wages, the process will not reach wages earned after the judgment was rendered. *Bliss v. Smith*, 78 Ill. 359.

4. *Norton v. Soule*, 75 Me. 385; *Bishop v. Young*, 17 Wis. 46. As to "Contingencies Generally," see *ante*, § 481.

What is not a contingency.—Where labor contracted for is performed, the fact that its amount and value has not been fixed by the contract, and that payment is to be made on the estimate of a certificate of a third person, is not such a contingency as will defeat an attachment. *Ware v. Gowen*, 65 Me. 534.

The fact that a certain per cent. of the price shall be retained until the contractor's engineer shall certify in writing as to the completion of the contract, is not such an uncertainty as to make the debt exempt from garnishment by a creditor of the contractor, after the completion and before such

between the employer and employe, to be at such times as the employer may, from time to time elect, the wages can not be reached by garnishment.¹ When work is to be accepted by the employer before it is paid for, the price for labor can not be garnished before the work is completed and the employer has expressed his acceptance.²

Furthermore, where an employer has an equitable lien upon the wages, or where the employer, or one member of a firm of employers, has a demand against the employe, which it was agreed should be paid from the earnings, the wages or salary of such employe can not be garnished in the hands of the employer until such demand or lien is paid or satisfied.³ Property on which there is an existing lien can not be garnished.⁴ Likewise where a contractor does not complete his contract, whatever he may have earned can not be garnished where the employer's damages for breach of the contracts exceeds that sum.⁵

Where the labor to be performed is an entirety, as the man-

certificate is given. *Miller v. Scoville*, 35 Ill. App. 385.

1. *Potter v. Cain*, 117 Mass. 238.

2. *Daily v. Jordan*, 2 Cush. (Mass.) 390; *Wood v. Buxton*, 108 Mass. 102.

3. *Hall v. Magee*, 27 Ala. 414; *Mason v. Ambler*, 6 Allen (Mass.) 124; *Thorne v. Matthews*, 5 Cush. (Mass.) 544; *Faulkner v. Waters*, 11 Pick. (Mass.) 473; *Wart v. Mann*, 124 Mass. 586; *Worthington v. Jones*, 23 Vt. 546.

4. *Ante*, § 481. *Post*, § 584.

Where it is agreed between all the parties that the wages or a part thereof shall be applied toward the rent of a house occupied by the laborer and owned by one of the firm, the wages are exempt from garnishment until the rent is paid. *Mason v. Ambler*, 6 Allen (Mass.) 124.

Where it was agreed that the employe was to receive enough of his salary to pay the necessary expenses

of his family, and the balance was to be applied to the liquidation of a debt which he owed the firm, the salary is exempt from garnishment. *Hall v. Magee*, 27 Ala. 414. Such a contract between employer and employe is not fraudulent. *Worthington v. Jones*, 23 Vt. 546.

Where the salary to be paid varies with the profit, and a part of the same is to be retained to indemnify the employer against loss in the business in which the employe shares, the sum so held as security is beyond the reach of garnishment. *Faulkner v. Waters*, 11 Pick. (Mass.) 473.

When an employe who works for a shopman owes him a sum of money, the shopman may pay himself from the drawer and defeat a process of garnishment. *Thorne v. Matthews*, 5 Cush. (Mass.) 544.

5. *Doyle v. Gray*, 110 Mass. 206.

ufacture of a large number of articles to be paid for when finished, the employer can not be held as garnishee of the laborer where the latter abandons the work and leaves it unfinished; nor where he is doing the labor, and before the work is performed on all the articles.¹

§ 556. (b) **Not when wages or salary assigned.**—A laborer when employed, and although he be a debtor, may lawfully assign his future earnings to another creditor or third person if the employer will agree to pay the wages accordingly, and such wages, after the services have been rendered, will be beyond the reach of process of garnishment served upon the employer.² But it is absolutely essential that the contract under which the labor is to be performed is an engagement then existing, and the new agreement or assignment must be untainted with fraud.³

Where, however, such pretended assignment is invalid, as

1. *Otis v. Ford*, 54 Me. 104; *Robinson v. Hall*, 3 Metc. (Mass.) 301.

2. *Denver, T. & Ft. W. R. Co. v. Smeeton*, 2 Colo. App. 126, 29 Pac. Rep. 815; *Osborne v. Jordan*, 3 Gray (Mass.) 277; *Taylor v. Lynch*, 5 Gray (Mass.) 49; *Weed v. Jewett*, 2 Metc. (Mass.) 608; *Taber v. Nye*, 12 Pick. (Mass.) 105; *Gardner v. Hoeg*, 18 Pick. (Mass.) 168; *Callaghan v. Pocasset Mfg. Co.*, 119 Mass. 173; *Kane v. Clough*, 36 Mich. 436; *White v. Richardson*, 12 N. H. 93.

This is true although the assignee may be the treasurer of the employer, a corporation. *Callaghan v. Pocasset Mfg. Co.*, 119 Mass. 173.

An order accepted becomes an assignment.—A written order of a workman on the employer to pay wages to a certain man, to be earned under an engagement then existing, where such engagement is for an agreed price, though of uncertain duration, becomes, when accepted by the employer, a valid assignment of the

wages to be earned, and such wages will be free from garnishment. *Taylor v. Lynch*, 5 Gray (Mass.) 49.

The same is true, although the wages are to be paid in advance. *Callaghan v. Pocasset Mfg. Co.*, 119 Mass. 173.

Priorities.—Where a contest arises between two *bona fide* creditors of the debtor, one claiming the wages by virtue of an assignment, and the other claiming the same by virtue of an attachment, then, if the attachment did not take effect because the claim was contingent and not due, the assignment will take effect, though subsequent in point of time. *Taber v. Nye*, 12 Pick. (Mass.) 105.

3. *Archer v. People's Sav. Bk.*, 88 Ala. 249; *Alexander v. Pollock*, 72 Ala. 137; *Wade v. Bessey*, 76 Me. 413; *Hartley v. Tapley*, 2 Gray (Mass.) 565; *Taylor v. Lynch*, 5 Gray (Mass.) 49; *Lannan v. Smith*, 7 Gray Mass.) 150; *Weed v. Jewett*, 2 Metc. (Mass.) 608; *Callaghan v. Pocasset Mfg. Co.*, 119

where a written assignment has not been recorded in accordance with the requirement of the statute, the wages due may be secured by process of garnishment served upon the employer to the same effect as though no effort had been made to assign them.¹

When the wages are payable in non-negotiable orders or certificates, the same may be sold by the employe before they are received; and any act equivalent to an acceptance of the assignee as the person to whom they are to be paid by the employer will be equivalent to an assignment and acceptance, and will relieve the payor from liability to process of garnishment subsequently served.²

Any surplus over and above the amount assigned by accepted order or otherwise which, it is understood between the parties, remains payable from the employer to the employe, is liable to garnishment in the hands of the employer at suit of a creditor of a laborer.³

§ 557. (c) **Not for wages exempt by statute.**—There is, in almost every state, some special statutory provision exempting from execution and attachment the wages of laborers who are the heads of families. Such exemption usually extends to a certain amount of money, but in some instances it extends to a certain time and prohibits the seizure or appropriation of the wages earned within that time. It is not pertinent, in this connection, to point out the exact exemption in each of the several states, but only to treat of the general rules governing the exemption of wages. In general, journeymen, mechanics and other laborers who are married, or are the heads of fami-

Mass. 173; *Worthington v. Jones*, 23 Vt. 546.

Where the engagement has a present potential existence the earnings may be assigned, although the contract be indefinite as to time and amount. *Wade v. Bessey*, 76 Me. 413.

1. *Wright v. Smith*, 74 Me. 495; *Pullen v. Monk*, 82 Me. 412, 19 Atl. Rep. 909; *Mansard v. Daley*, 114 Mass. 408.

That an oral direction being revocable, the employer is chargeable as a garnishee, see *Mansard v. Daley*, 114 Mass. 408.

2. *Cairo, etc., v. R. R. Co.* *Killenberg*, 82 Ill. 295; *Willard v. Butler*, 14 Pick. (Mass.) 550.

3. *Macomber v. Doane*, 2 Allen (Mass.) 541.

lies, are entitled to an exemption of daily, weekly or monthly wages or salary to a certain amount, or earned within a certain time, free from the operation of execution, attachment and garnishment.¹ A statute which forbids the attachment of wages of a debtor earned within a certain length of time before the attachment, can not be construed to permit the attachment of wages earned thereafter.² And a statute in Maryland emphatically forbids the attachment of all wages not actually due.³

The rule that wages are exempt from garnishment, applies as well where the wages have been recovered by suit, and are in the hands of an officer obtained on an execution issued on a judgment therefor, as when such wages are still in the hands of an employer.⁴

1. *Enzor v. Hurt*, 76 Ala. 595; *Caraker v. Mathews*, 25 Ga. 571; *Russell v. Arnold*, 25 Ga. 625; *Moore v. McGown*, 64 Ga. 617; *Winslow v. Benedict*, 70 Ill. 120; *Seymour v. Cooper*, 26 Kan. 539; *Harding v. Hendrix*, 26 Kan. 583; *Muzzy v. Lantry*, 30 Kan. 49; *Zimmerman v. Franke*, 34 Kan. 650; *Davis v. Humphrey*, 22 Iowa 137; *Parks v. Knox*, 22 Me. 494; *Haynes v. Hussey*, 72 Me. 448; *Mangold v. Dooley*, 89 Mo. 111, 1 S. W. Rep. 126; *Snyder v. Brune*, 22 Neb. 189, 34 N. W. Rep. 364; *McCullough v. Carragan*, 24 Hun (N. Y.) 157; *Snook v. Snetzer*, 25 Ohio St. 516; *Scott v. Watson*, 36 Pa. St. 342; *Pierce v. Chicago & N. W. R. Co.*, 36 Wis. 283.

In some states the head of a family must be "living with the same." *Winslow v. Benedict*, 70 Ill. 120. And in some the wages must be also "necessary for the support of the family." *Snook v. Snetzer*, 25 Ohio St. 516; *McCullough v. Carragan*, 24 Hun (N. Y.) 157; *Harding v. Hendrix*, 26 Kan. 583; *Seymour v. Cooper*, 26 Kan. 539; *Muzzy v. Lantry*, 30 Kan. 49.

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The affidavit of the debtor that his earnings are necessary for the support of the family is *prima facie* evidence of the fact. *Muzzy v. Lantry*, 30 Kan. 49.

The "family" may consist of an aged father or mother and the sister of a single man, but not when he lives apart from them and assists in their support. *Seymour v. Cooper*, 26 Kan. 539; *Harding v. Hendrix*, 26 Kan. 583; *Muzzy v. Lantry*, 30 Kan. 49; *Zimmerman v. Franke*, 34 Kan. 650.

When the statute exempts the wages earned in a certain time before the attachment, it only applies to what is earned in that length of time immediately preceding the service of the process. *Haynes v. Hussey*, 72 Me. 448.

2. *Davis v. Humphrey*, 22 Iowa 137.

3. *House v. Baltimore, etc.*, R. R. Co., 48 Md. 130.

4. *Cox v. Bearden*, 84 Ga. 304, 10 S. E. Rep. 627; *Catlin v. Ensign*, 29 Pa. St. 264.

The law exempting the wages of a laborer is made for the benefit of those depending upon him, and consequently the laborer can not waive the exemption of his wages.¹

The excess which remains of the wages or salary due, after deducting the amount of the statutory exemption, may be held by process of garnishment served upon the employer at suit of a creditor of the laborer.²

A certain amount of wages being exempt from garnishment, the fact that the employer has been served with process does not affect the amount that is exempt. Consequently the laborer may draw the exempt portion of his wages in the same manner as though no process of garnishment had been served upon his employer.³

§ 558. (d) Who is a "laborer" and what is "wages" within the meaning of the law.—The wages of a "laborer," which are exempted by statute, are generally held to be such wages only as are earned by the hands and labor of the individual himself, and of his family under his direction, and do not extend to what is earned by him as a contractor or received by him as the superintendent or master of other laborers.⁴ There-

1. *Green v. Watson*, 75 Ga. 471, s. c. 58 Am. Rep. 479; *Firmstone v. Mack*, 49 Pa. St. 387.

Not by an executory contract. *Recht v. Kelly*, 82 Ill. 147.

2. *First Nat. Bank v. Weckler*, 52 Md. 30.

3. *Hoffman v. Fitzwilliam*, 81 Ill. 521.

But any payment by the employer during the garnishment proceedings is at the risk of the garnishee, for if he is ultimately held liable, the fact that he has made payment to the laborer can avail nothing against the garnishing creditor. *Archer v. People's Sav. Bank*, 88 Ala. 249; *Skipper v. Foster*, 29 Ala. 330; *ante*, § 487.

Wages earned after the service of the writ may be drawn by the laborer so that he does not get more than the

exempted amount accumulate in his employer's hands at one time. *Hoffman v. Fitzwilliam*, 81 Ill. 521. That money *earned* after service of process can not be held thereby, see *ante*, §§ 476, 555.

Special proceedings to recover wages.—The pendency of a general garnishment proceeding is no bar to a special statutory proceeding to subject wages of a debtor. *Dunlap v. Hooper*, 67 Ga. 721.

4. *Tatum v. Zachry*, 86 Ga. 573, 12 S. E. Rep. 940; *Kyle v. Montgomery*, 73 Ga. 337; *Miller v. Dugas*, 77 Ga. 386; *Shelly v. Smith*, 59 Iowa 453; *First Nat. Bank v. Jaggars*, 31 Md. 38; *Robbins v. Rice*, 18 N. H. 507; *Heebner v. Chave*, 5 Pa. St. 115; *Smith v. Brooke*, 49 Pa. St. 147.

But a statute in Maryland exempt-

fore a master carpenter who supervises the labor of the hands employed by him in building a house is not entitled to an exemption of wages as a laborer;¹ neither is the boss of a department who employs and discharges the hands;² nor is the conductor of a railway train who has full charge of the conduct and management of the train, passengers, baggage and condition of the track;³ nor is a blacksmith, who is the proprietor of the shop, entitled to an exemption from debts due by customers for work done by him, while carrying on an independent business for himself,⁴ but the wages of a book-keeper or clerk in a store are exempt as being that of a laborer.⁵ So are the wages of a forwarding clerk of a railway company;⁶ so are the wages of a locomotive engineer;⁷ so are the wages of a school-teacher,⁸ and so is a miner who himself works in a coal mine at so much per ton, although he has charge of a chamber with one or two hands under him.⁹ And so are the fees of an oil gauger in Pennsylvania.¹⁰

The wages of seamen may be exempt from garnishment because of statute and also because of being in the hands of a public officer or distributing agent of the government.¹¹ But

ing "wages or hire" was said to include a consideration in a written contract "of five per cent. of the entire amount of cost of building" for *superintending* its construction. *Moore v. Heaney*, 14 Md. 558.

"Current wages for personal services," exempted by a Texas statute, includes the earnings of a physician employed by a city to attend small-pox patients at \$30 per day. *Sydnor v. City of Galveston*, (Tex.), 15 S. W. Rep. 202.

1. *Smith v. Brooke*, 49 Pa. St. 147.

2. *Kyle v. Montgomery*, 73 Ga. 337.

3. *Miller v. Dugas*, 77 Ga. 386.

4. *Tatum v. Zachry*, 86 Ga. 573, 12 S. E. Rep. 940.

5. *Lamar v. Chisholm*, 77 Ga. 306; *Williams v. Link*, 64 Miss. 641, 1 So. Rep. 907.

6. *Clarhorn v. Saussy*, 51 Ga. 576.

7. *Sanner v. Shivers*, 76 Ga. 335.

8. *Hightower v. Slaton*, 54 Ga. 108; *Allen v. Russell*, 78 Ky. 105; *Schwacke v. Langton*, 12 Phila. (Pa.) 402.

9. *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 241.

One case in Georgia holds, under a statute, exempting daily, weekly or monthly wages of a journeyman, mechanic or day laborer, that where an overseer, working at a fixed salary for the year, was to be paid daily or weekly, his wages were exempt. *Hightower v. Slaton*, 54 Ga. 108.

10. *Hutchinson v. Gormley*, 48 Pa. St. 270.

11. *McCarty v. Steam Propeller*, etc., 4 Fed. Rep. 818; *Buchanan v. Alexander*, 4 How. 20.

in Massachusetts the wages of a seaman on a coasting voyage on the Atlantic may be secured by garnishment.¹ And so in Maine may the wages of a seaman engaged in a coasting trade when the wages are in the hands of his attorney, though that attorney be a proctor in the admiralty court.² But in no case can the wages of a seaman be reached by garnishment unless the voyage, in which the wages are earned, has been completed.³

§ 559. (e) **Non-resident laborers entitled to exemption.**—The fact that the laborer, the debtor, against whom the suit is brought is a non-resident, does not affect his exemption of wages due from his employer, the resident garnishees. The law relating to exemptions affects the remedy when an action is brought in that state. Therefore the exemption laws of the state where the action is brought generally obtain.⁴

Where, however, the wages were earned and payable in another state, the exemption laws of that state control in an action brought in this state.⁵ And in Illinois, by statute, where the debt due the non-resident laborer was earned by him and is payable outside of the state, the exemption will be allowed as it is at the time allowable to him by the laws of the state in which he so resides.⁶ And the exemption laws of the state

1. *White v. Dunn*, 134 Mass. 271.

2. *Ayer v. Brown*, 77 Me. 195.

3. *The Lizzie Williams*, 11 Fed. Rep. 619; *Wentworth v. Whittemore*, 1 Mass. 471; *Taber v. Nye*, 12 Pick. (Mass.) 105.

This applies where the wages of the voyage are to become due as an entirety and would not apply where the wages are due and payable by the month as in steamboat service.

4. *Wabash R. R. Co. v. Dougan*, 142 Ill. 248; *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365; *Kansas City, St. Joseph, etc., R. R. Co. v. Gough*, 35

Kan. 1; *Wright v. Chicago, Burlington, etc., R. R. Co.*, 19 Neb. 175.

The rule was applied, although all the parties were non-residents and jurisdiction of the court had been obtained by the garnishees doing business in the state and the temporary presence of the other parties. *Missouri P. R. Co. v. Maltby*, 34 Kan. 125.

5. *Singer Mfg. Co. v. Fleming*, 39 Neb. 673, 58 N. W. Rep. 226. Further as to the "Jurisdiction of the debt," see *ante*, § 489-491.

6. *Laws 1891*, p. 141; *Wabash R. R. Co. v. Dougan*, 142 Ill. 248.

where the action is brought has no application when neither the debtor nor himself reside in that state.¹

Furthermore, it has been held that where garnishment was brought in a state where the employer was doing business, and the purpose of the action was to secure the wages of the debtor which were exempt in the state in which both the plaintiff and defendant reside, and in which the employer also did business, that injunction would lie to prevent the prosecution of the claim.² In Illinois it is a misdemeanor, punishable with fine, for any person, with intent to deprive his debtor of the right of the exemption laws of that state, to send any claim or debt out of that state to be collected by process of garnishment or attachment when the person or corporation sought to be charged as garnishee is within the reach of the process of the courts of that state.³

§ 560. (f) **Garnishee must claim exemption for laborer.**—An employer who is garnished for the wages due a laborer must, in his answer, claim for the laborer the exemption to which he is entitled at law. If he does not do so the loss may fall upon him, because the laborer himself is not affected by the failure of the garnishee to protect the fund, and consequently may call upon the employer thereafter to pay it, notwithstanding it may

1. *Commercial Nat. Bank v. Chicago, M. & St. P. R. R. Co.*, 45 Wis. 172.

2. *Moton v. Hull*, 77 Tex. 80, 13 S. W. Rep. 849.

3. *Wabash R. R. Co. v. Dougan*, 142 Ill. 248.

But the Illinois courts do not inquire into the motive of plaintiffs bringing action therein, and will maintain a proceeding although brought therein because the desired relief could not be obtained in another state, where the parties reside, because of the exemption laws of that state. *Wabash R. R. Co. v. Dougan*, 142 Ill. 248; *Mineral Point Ry. Co. v. Barron*, 83 Ill. 365.

Conflict of laws.—A laborer did work for a corporation doing business in the state where the laborer resided. His creditor in another state, where the corporation also did business, garnished the corporation for the wages of the debtor, and obtained service of summons upon the employe by publication and recovered judgment. Afterwards the laborer sought to recover his wages in the former state where he resided. It was there held that the former recovery could not be set up in defense by the corporation. *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375, 387, 23 Pac. Rep. 430.

have been paid to satisfy the garnishment.¹ The garnishee is not protected by a judgment against him when he fails to state in his answer the facts which show the exemption.² One court has said that it is the duty of the garnishee (a corporation) to exhaust all means to avoid a judgment against itself, and for this purpose must bring to the notice of the court the fact that the principal debtor's claim was exempt, or must notify him of the proceeding and request him to defend.³

§ 561. (g) **Exemption may be defeated by claim for necessities.**—Some of the state statutes providing for an exemption of wages expressly state that when the claim sought to be enforced is a demand other than for necessities, the exemption will be allowed; this then permits the garnishment of wages to pay for necessities furnished the laborer.⁴ Other statutes provide specially for the subjection of wages when the creditor seeks to collect a demand arising from such necessities as provisions, board, etc.⁵ These special provisions will be known to the local practitioner, and further mention of them would be irrelevant in this connection.

§ 562. **When debt evidenced by note or bill—Generally.**—Garnishment being designed to secure in the hands of the garnishee any indebtedness which he owes, or property which he should return to the principal defendant, it is generally inapplicable where the person contemplated as garnishee has evidenced his indebtedness by a promissory note or bill of exchange. He acknowledges his indebtedness, and if it were a certainty that such indebtedness were payable to the defendant, then the maker of the promissory note or bill of exchange might gen-

1. *Smith v. Johnston*, 71 Ga. 748; *Chicago, etc., R. R. Co. v. Ragland*, 84 Ill. 375; *Welker v. Hinze*, 16 Ill. App. 326; *Chicago, etc., Co. v. Mason*, 11 Ill. App. 525.

2. *Missouri Pac. Ry. Co. v. Whip-sker*, 77 Tex. 14.

3. *Pierce v. Chicago, etc., R. R. Co.*, 36 Wis. 283.

4. *Burns v. Marland, etc., Co.*, 14 Gray (Mass.) 487; *Hall v. Hartwell*, 142 Mass. 447; *Abbott v. Smith*, 64 N. H. 615, 10 Atl. Rep. 817.

5. *Dunlap v. Hooper*, 67 Ga. 721; *Rischert v. Kunz*, 9 Mo. App. 283; *Smith v. McGinty*, 101 Pa. St. 402.

erally be properly made a garnishee; but from the very nature of notes and bills, as governed by the law merchant, the payee is uncertain, and, by the rule,¹ nothing can be reached by garnishment except what is payable to the principal debtor, and furthermore garnishment is generally inapplicable to notes and bills because it is generally an efficient remedy only in cases where the indebtedness is actually payable,² and from the very nature of notes and bills they generally represent an indebtedness which is payable at some future time. Nevertheless there are many instances in which the maker of a note or drawer of a bill may be held as garnishee, not only because the indebtedness is payable to the principal defendant, nor because the debt is presently payable, but also because in many states a debt becoming due in the future may be presently secured by process of garnishment. Furthermore, and notwithstanding notes and bills are choses in action, they may be regarded as an exception to the general rule that choses in action may not be reached by process of garnishment.³

§ 563. **As to non-negotiable instruments.**—Non-negotiable instruments are not governed by the law merchant, and because of their being payable to a certain person, there is no good reason why the maker of such non-negotiable instrument may not be held as a garnishee when such instrument is due and payable, and in all other cases in which choses in action may be reached by process of garnishment; that is to say, in states where a present indebtedness due in the future may be secured, and where choses in action unassigned may be reached.⁴

1. *Ante*, § 475.

2. *Ante*, § 480.

3. Attachment by direct seizure is generally inapplicable in the case of negotiable instruments, but that their attachability may be defined, special acts have been passed making them the subject of attachment by garnishment, and when such statute exists the proper way to reach promissory notes in attachment proceedings is by

garnishment process. *Prout v. Grout*, 72 Ill. 456.

A bond is embraced within the meaning of the words of the statute 'property, or money, or effects,' and may therefore be made the subject of garnishment. *Banning v. Sibley*, 3 Minn. 389.

4. *Junction R. R. Co. v. Cleneay*, 13 Ind. 161; *Simpson v. Potter*, 18 Ind. 429; *King v. Vance*, 46 Ind. 246.

§ 564. As to negotiable instruments—(a) Rule requiring them to be owned by the payee.—The maker of a negotiable instrument can not generally be held as a garnishee, because, from the negotiable character of the instrument, it is uncertain that he will be called upon to pay the amount to the payee named in the instrument. And by rule,¹ nothing can be reached by garnishment that could not be reached had the principal debtor brought the action at law against his debtor, the garnishee. The principal defendant must be the creditor of the garnishee.² Therefore, where a negotiable instrument is still current, the maker of the instrument can not be held liable in garnishment because of the uncertainty to whom he will be called upon to make payment.³

1. *Ante*, §§ 475, 487.

2. *M'Bride v. Floyd*, 2 Bailey L. (S. C.) 209; *Gaffney v. Bradford*, 2 Bailey L. (S. C.) 441; *Kimball v. Plant*, 14 La. 10; *Wybrants v. Rice*, 3 Tex. 458; *Davis v. Pawlette*, 3 Wis. 300; *Sheets v. Culver*, 14 La. 449.

Certificate of deposit.—An ordinary certificate of indebtedness of a banker does not represent any specific money of the original holder in the hands of the banker susceptible of attachment. It is only a certificate of indebtedness. *McMillan v. Richards*, 9 Cal. 365.

3. *Huot v. Ely*, 17 Fla. 775; *Reynolds v. Horn*, 4 La. Ann. 187; *Erwin v. Commercial, etc., Bank*, 3 La. Ann. 186; *Price v. Brady*, 21 Tex. 614; *Bassett v. Garthwaite*, 22 Tex. 230; *Kapp v. Teel*, 33 Tex. 811; *Hutchins v. Evans*, 13 Vt. 541.

The garnishee must owe the defendant.—To hold the maker of a note liable as a garnishee, he must be indebted to the defendant; therefore, one who has purchased goods from a vendor by giving his note payable to a third person, is not indebted to the vendor, and the maker is not liable as a garnishee in a suit against him, although the goods were (unknown to the pur-

chaser) sold with intent to defraud creditors. *Diefendorf v. Oliver*, 8 Kan. 365.

For the same reason the maker of a note payable to two persons can not be held as a garnishee in a suit against one of them only. *Hanson v. Davis*, 19 N. H. 133; *ante*, § 524, *et seq.*

For a like reason one who merely holds in his possession notes belonging to the principal defendant, can not be held liable as a garnishee. *Dickinson v. Strong*, 4 Pick. (Mass.) 57. Further, as to "Custodian," see *post*, § 576, and as to "Notes held as collateral security," *post*, § 573.

Maker of a note payable to wife can not be held liable as garnishee at suit against a husband.—On the principle that the garnishee must be indebted to the principal defendant, a garnishee can not be held liable on a promissory note which he has made payable to the defendant's wife, wherever the wife holds her property separate from her husband. *Parks v. Cushman*, 9 Vt. 320; *Way v. Pierce*, 51 Vt. 326; *Hayward v. Clark*, 50 Vt. 612. And in the absence of fraud a note made payable to a wife in consideration of a sale by her husband of his interest

Where, however, such uncertainty does not exist because of the fact that the note is still owned by and in the hands of the payee named therein, the courts, on principle, have many times permitted the maker of such instrument to be held by process of garnishment issued in a suit brought against the payee.¹

§ 565. (b) Rule requiring them to be due.—Furthermore in courts requiring an indebtedness to be payable at the time of the service of process, the note, though still owned by the payee, must also be due. The note must have matured.²

in a partnership, is her separate property and can not be reached in a suit against him. . *Worthy v. Clapp*, 99 Mass. 561. For an application of the old rule deeming the husband to be the owner of a note payable to the wife, see *Shuttlesworth v. Noyes*, 8 Mass. 229; *Hockady v. Sallee*, 26 Mo. 219. For an application of the rule where the husband and wife own by entireties, see *Fogleman v. Shively*, 4 Ind. App. 197, 27 N. E. Rep. 873, 30 N. E. Rep. 909.

1. *Mills v. Stewart*, 12 Ala. 90; *King v. Vance*, 46 Ind. 246; *Denham v. Pogue*, 20 La. Ann. 195; *Decoster v. Livermore*, 4 Mass. 101; *Richards v. Stephenson*, 99 Mass. 311; *Scott v. Hawkins*, 99 Mass. 550; *Somers v. Losey*, 48 Mich. 294; *Quarles v. Porter*, 12 Mo. 76; *Colcord v. Daggett*, 18 Mo. 557; *Pellman v. Hart*, 1 Pa. St. 263; *Kellogg v. Fancher*, 23 Wis. 21; *Getchell v. Chase*, 124 Mass. 366; *Chase v. Bradley*, 17 Me. 89; *Leland v. Sabin*, 27 N.H.74; *Huff v. Mills*, 7 Yerger (Tenn.) 42; *Bassett v. Garthwaite*, 22 Tex. 230; *Thompson v. Gainesville, etc.*, Bank, 66 Tex. 156; *Camp v. Scott*, 14 Vt. 387; *Howe v. Ould*, 28 Gratt. (Va.) 1.

A note payable on *demand* is not negotiable security, and the proceeds thereof may be secured by process of garnishment served upon the maker

in a suit against the person for whose benefit the note was taken, when it is shown that the note remained in his hands two months after its date. *Camp v. Scott*, 14 Vt. 387. Or under a statute making negotiable security that which is "payable on time and not overdue." *Scott v. Hawkins*, 99 Mass. 550.

It must generally be in the possession of the payee, but it has been held sufficient that he is the *owner*. *Howe v. Ould*, 28 Gratt. (Va.) 1. But it must not be in the hands of a *bona fide* purchaser for value. *King v. Vance*, 46 Ind. 246. See, as to "Assignment," *post*, § 567.

When note made to defeat garnishment, as for payment of board in advance, after service of process, the maker may be held liable as garnishee. *Cowdry v. Walker*, 59 N. H. 533.

2. *Mayberry v. Morris*, 62 Ala. 113; *Wilson v. Albright*, 2 Greene (Iowa) 125; *Commissioners v. Fox*, 1 Morr. (Iowa) 48; *Greer v. Powell*, 1 Bush. (Ky.) 489; *Gregory v. Higgins*, 10 Cal. 339; *Cleneay v. Junction R. Co.*, 26 Ind. 375; *Fuller v. O'Brien*, 121 Mass. 422; *Hubbard v. Williams*, 1 Minn. 54; *Matheny v. Hughes*, 10 Heisk. (Tenn.) 401; *Moore v. Pillow*, 3 Humph. (Tenn.) 448; *Inglehart v.*

When negotiable instruments fall due they cease to have a negotiable character in such sense, at least, that a subsequent assignee can not be deemed to be a *bona fide* holder; for, by a well-known rule of the law merchant, he takes the instrument subject to all the defenses that might be set up against the assignor of it, and, therefore, would be subject to a plea in bar interposed by the maker—the garnishee—and for this reason the maker of a note can not be injured by being held as a garnishee when such note has matured.¹

Where a promissory note has become due and is owned by the principal defendant, a process of garnishment served upon the maker will fix his liability and he will be protected in paying over the money after judgment is entered against the principal defendant.²

§ 566. (c) **Rule not requiring them to be due.**—Another and less prevalent rule based upon special statutes permits the garnishment of the maker of a negotiable promissory note or bill of exchange, although the same be not actually due and payable; but in every such case it must still be the property of the holder against whom the main action is brought, for otherwise garnishment will not reach it.³ Such a garnishment

Moore, 21 Tex. 501; Price v. Brady, 21 Tex. 614; Bassett v. Garthwaite, 22 Tex. 230; Willis v. Heath, 75 Tex. 124, 12 S. W. Rep. 971.

Burden of proof.—The burden of proof is upon the plaintiff to show that the instrument has matured and that at the time of its maturity it was held by the attachment defendant, or that it was not in the hands of a *bona fide* holder. Cleneay v. Junction R. R., 26 Ind. 375; Scott v. Hill, 3 Mo. 88.

1. Simpson v. Hall, 47 Conn. 417; Robinson v. Lyman, 10 Conn. 30; Stedman v. Jillson, 10 Conn. 55; Fairchild v. Brown, 11 Conn. 26; McCoid v. Beatty, 12 Iowa 299; Arents v. Commonwealth, 18 Gratt. (Va.) 750; Littlefield v. Hodge, 6 Mich. 326.

Checks not payable can not be gar-

nished.—For the reason above stated when checks are not payable, the drawer can not be held liable in garnishment. Barnard v. Graves, 16 Pick. (Mass.) 41; Knight v. Bowley, 117 Mass. 551; Fulweiler v. Hughes, 17 Pa. St. 440.

2. Somers v. Losey, 48 Mich. 294.

3. *Ante*, § 564.

A debt owing upon negotiable paper before maturity is no less a *right* or *credit* of a defendant than a debt due upon the same paper after maturity or upon paper not negotiable; and such debt is by the provisions of the statute made the subject of garnishment. Briant v. Reed, 14 N. J. Eq. (1 McCart.) 271.

The attachment of a bill of exchange belonging to the defendant

appropriates the funds in the hands of the garnishee to the payment of the debt of the defendant who owns the note, and binds all those claiming through him with actual notice of the attachment, but will not bind a *bona fide* holder of a negotiable note for value and without notice. Every such garnishment, therefore, is liable to be defeated by a transfer of the note at any time before the debt becomes due.¹ The doctrine of implied notice by *lis pendens* does not apply in such case.²

The fact that an attachment of a negotiable instrument will not prevent a subsequent *bona fide* purchaser for value, before the same becomes due, from acquiring good title by the law merchant, has led some states to enact laws preventing the attachment defendant from transferring negotiable paper after garnishment proceedings have been begun.³ And one court has said that an indorser, with actual notice of the proceedings, will be restrained from transferring the note so as to defeat the attachment.⁴

Where a garnishee is served with process in a suit against the holder of a note, the garnishee will thereafter pay the note at his peril, either to the defendant or to a party who acquires

gives the plaintiff only the defendant's interest in the bill, whatever that may be. *Davis v. Bastos*, 9 La. Ann. 359.

1. *Enos v. Tuttle*, 3 Conn. 27; *Colcord v. Daggett*, 18 Mo. 557; *Elmer v. Welch*, 47 Conn. 56; *Pursell v. Pappenheimer*, 11 Ind. 327; *Kimball v. Plant*, 14 La. 511; *Mims v. West*, 38 Ga. 18; *Junction R. R. Co. v. Cleneay*, 13 Ind. 161; *Bills v. Park Bank*, 89 N. Y. 343; *Robinson v. Mitchell*, 1 Harrington 365; *Peace v. Jones*, 3 Murph. (N. C.) 256; *Steuart v. West*, 1 Harr. & J. (Md.) 536; *Clough v. Buck*, 6 Neb. 343; *Knisely v. Evans*, 34 Ohio St. 158; *Secor v. Witter*, 39 Ohio St. 218; *Walker v. Gibbs*, 2 Dall. 211, 1 Yeates (Pa.) 255; *Kieffer v. Ehler*, 18 Pa. St. 388; *Hill v. Kroft*, 29 Pa. St. 186; *Day v. Zimmerman*, 68 Pa. St.

72; *County of Warren v. Marcy*, 97 U. S. 96; *United States v. Mora*, 97 U. S. 413.

2. *Kieffer v. Ehler*, 18 Pa. St. 388.

3. *Elmer v. Welch*, 47 Conn. 56; *Kieffer v. Ehler*, 18 Pa. St. 388.

It is said that the negotiation of a negotiable promissory note by a payee, after he has had notice of the attachment, is a fraud upon the law, and the court from which the attachment issues has power to require it to be placed in such custody as will prevent it from being misapplied. *Kieffer v. Ehler*, 18 Pa. St. 388.

Special statutory provisions for maintaining an action for such fraud within a given time have been enacted. *Elmer v. Welch*, 47 Conn. 56.

4. *Secor v. Witter*, 39 Ohio St. 218.

title—to an overdue note—after service of summons.¹ This is contrary to the principle applied to negotiable instruments before they are due because in such case a *bona fide* holder is not subjected to the equities between the original parties, as he is when he takes overdue paper.

On principle the maker of a negotiable instrument should not be charged as a garnishee of a holder when process is served upon him before maturity of the note, unless the note has become due and payable before judgment is to be entered thereon.²

It is a rule of general application that a court will not enter a judgment against the garnishee unless he will be completely exonerated by payment from all liability thereafter to other persons on his indebtedness.³ Where the maker of a negotiable instrument is garnished for the debt of the owner and holder of the note—either the payee or an indorsee—and the garnishment is followed by judgment and condemnation, such judgment will protect the maker—the garnishee—against any subsequent action brought on the same note by a subsequent indorser, though he receive the note without notice of the attachment.⁴ This is on the principle that there can be no judgment and condemnation before the note is due,⁵ but if the garnishee answer, admitting an indebtedness to the principal defendant, without qualification, on a *negotiable* instrument not due, he does so at his peril and may be held liable in a subsequent action.⁶

1. *Burton v. Wynne*, 55 Ga. 615; *Donnell v. Portland & Ogdensburg R. Co.*, 76 Me. 33; *Newton v. Gray*, 10 La. Ann. 67.

2. *Mims v. West*, 38 Ga. 18; *Elmer v. Welch*, 47 Conn. 56; *Thompson v. Gainesville Nat. Bank*, 66 Tex. 156, 18 S. W. Rep. 350.

3. *Ante*, §§ 471–474, and *post*, § 678.

This is also declared, by statute, to be the rule in Iowa. *Yocum v. White*, 36 Iowa 288; *Hughes v. Monty*, 24 Iowa 499.

4. *Somerville v. Brown*, 5 Gill (Md.) 399.

5. *Somers v. Losey*, 48 Mich. 294.

But paying one note by giving another extending the time of payment will not affect the rights of the garnishing creditor. Judgment will be rendered against the maker because the first note is due, although the renewed note be not due, and although he does not know who owns it. *Leslie v. Merrill*, 58 Ala. 322.

6. *Cross v. Haldeman*, 15 Ark. 200. Further as to "Notice," see *post*, § 569.

Exception to the rule.—Where the prevailing rule permits the maker of an undue negotiable instrument to be held as a garnishee it still has one exception. This is in the case of insolvency of the principal defendant. If the law holds his assets toward the satisfaction of all his general creditors, the garnishee will not be compelled to pay over to the plaintiff the amount which he owes to the defendant.¹

§ 567. (d) **Effect of assignment upon garnishee.**—The general rule governing the assignment of choses in action² obtains in regard to notes and bills. The maker of a note that is not negotiable can not be held as a garnishee of the payee if the instrument has been assigned to a *bona fide* third person and notice of the transfer given to the maker before the service of process.³ But if no notice to the maker be given of the transfer of a non-negotiable instrument, the garnishment will prevail.⁴ In this one respect the assignment of non-negotiable instruments is governed by a different rule than that which obtains in regard to other assigned choses in action.⁵ But this is not without reason, for by the law merchant, the taker of such an instrument is charged with notice of the defenses which the maker may set up, and he may undoubtedly set up the fact of the garnishment as a bar.⁶ The rule also governs instruments which have lost their negotiable character by having matured and have been thereafter assigned. Such assignment passes an equitable interest which will prevail against a subsequent attachment of the note by garnishment process served upon the maker.⁷ The assignment constitutes a valid defense to the attachment.⁸ It has been said in Iowa that notice of assign-

1. *Schuler v. Israel*, 120 U. S. 506.

2. *Ante*, § 537.

3. *Newell v. Adams*, 1 D. Chip. (Vt.) 346.

4. *Hinsdill v. Safford*, 11 Vt. 309. *Contra*, where transferred by a debtor *bona fide*, in payment of a debt. *Pellman v. Hart*, 1 Pa. St. 263.

5. *Ante*, § 538.

6. *Supra*, § 565.

7. *Norton v. Piscataqua Ins. Co.*, 111 Mass. 532; *Walden v. Valiant*, 15 Mo. 409; *Mills v. Stewart*, 12 Ala. 90.

A bill or note does not lose its negotiable character by being dishonored. *Morgner v. Bigelow*, 3 Mo. App. 592.

8. *Gates v. Kerby*, 13 Mo. 157; *Simmons v. Guyon*, 57 Ala. 111; *Garrott v. Jaffray*, 10 Bush. (Ky.) 413.

As to bringing in the assignee as a

ment that is made after service of process and before answer is filed will not defeat the garnishment.¹ But this is contrary to the general rule,² and contrary to the rule governing the indorsement of negotiable instruments.³

§ 568. (e) **Effect of indorsement upon garnishee.**—The maker of a negotiable promissory note which has not matured can not be held as the garnishee of the payee or indorser, where the note has, either before or after service of process, been transferred to a third person, although the maker have notice of the garnishment.⁴ The reason for this rule is that the *bona fide* purchaser, for value and without notice of the garnishment of a negotiable instrument before it is due, takes a good title as against all the world,⁵ and since the principal defendant is divested of his title he could not recover, therefore the plaintiff can not recover.⁶ So long as a negotiable instrument is not yet due, the maker is bound to the unknown holder, whoever he may prove to be, and therefore no notice of the assignment by indorsement need be given to the maker in order to perfect the transfer, and, consequently, lack of no-

party to the proceeding, see *Simmons v. Guyon*, 57 Ala. 111; *Garrott v. Jaffray*, 10 Bush. (Ky.) 413.

1. *Stevens v. Pugh*, 12 Iowa 430.

2. *Ante*, § 538.

3. Next succeeding section.

The rule that the maker of a non-negotiable instrument, which is afterwards assigned, must recognize the assignee as his creditor was applied in the case of *Folsom v. Haskell*, 11 Cush. (Mass.) 470.

For the rule as applied to the drawee of a bill of exchange, see *post*, § 574.

Fraudulent transfer of note.—When one has come into possession of a note by a transfer which was made merely for the purpose of defeating the legal pursuit of creditors, a creditor may disregard the transfer and attach. *Enos v. Tuttle*, 3 Conn. 27; *Kenosha Stove Co. v. Shedd*, 82 Iowa

540, 48 N. W. Rep. 933; *Bridge v. Shedd*, 82 Iowa 540, 48 N. W. Rep. 933; *Burdett v. Shedd*, 82 Iowa 540, 48 N. W. Rep. 933; *North v. Gordon*, 15 La. Ann. 221. (Attachment is by seizure in Louisiana.)

Furthermore, one who receives a note which has been transferred to him to defraud creditors, may be made a garnishee and held liable, although he has received no money on the note; and he can not defend by showing that, because of the fraud, he has acquired no title to the notes. *Kenosha Stove Co. v. Shedd*, 82 Iowa 540, 48 N. W. Rep. 933; *Bridge v. Shedd*, 82 Iowa 540, 48 N. W. Rep. 933; *Burdett v. Shedd*, 82 Iowa 540, 48 N. W. Rep. 933.

4. *Cruett v. Jenkins*, 53 Md. 217.

5. *Hinsdill v. Safford*, 11 Vt. 309.

6. *Ante*, § 475 *et seq.*

tice to the maker has no effect whatever upon his liability. Process of garnishment served upon him in a suit against the payee or a former indorsee will be defeated by indorsement without notice to the maker.¹

§ 569. (f) **Effect of notice to the maker—The garnishee.**
—The rule regarding notice to the person indebted upon a promissory note or bill of exchange is not the same as that respecting notice to other garnishees indebted upon assigned choses in action.² This results from the fact that notes and bills are governed by the law merchant, and when an effort is made to harmonize the latter with the law of attachment much difficulty and confusion is encountered. The nearest approach to general rules seems to be the following:

When a non-negotiable instrument or an instrument that has fallen due is assigned, notice of such assignment must be given to the maker or he may be charged as garnishee of the payee, or indorsee, known to be in possession of such non-negotiable instrument, or matured negotiable instrument. This is because the taker of such an instrument is liable to all the defenses that might have been set up against the payee, one of which defenses is the fact of the assignment.³

1. *Green v. Gillet*, 5 Day (Conn.) 485; *Cruett v. Jenkins*, 53 Md. 217; *Oldham v. Ledbetter*, 1 How. (Miss.) 43; *Edney v. Willis*, 23 Neb. 56, 36 N.W. Rep. 300; *Howe v. Hartness*, 11 Ohio St. 449; *Corser v. Craig*, 1 Wash. C. C. 424; *Hinsdill v. Safford*, 11 Vt. 309; *Little v. Hale*, 11 Vt. 482.

mailed to the claimant he became the owner thereof. *Howe v. Ould*, 28 Gratt. (Va.) 1.

2. *Ante*, §§ 538-540.

3. *Collier v. Hershey*, 21 Ark. 482; *Judah v. Judd*, 5 Day (Conn.) 534; *Bishop v. Holcomb*, 10 Conn. 444; *Woolfolk v. Bank of America*, 10 Bush. (Ky.) 504; *Swift v. Tyson*, 16 Pet. (U. S.) 1; *Elston v. Gillis*, 69 Ind. 128; *Canaday v. Detrick*, 63 Ind. 485; *Shetler v. Thomas*, 16 Ind. 223; *Schoppenhast v. Bollman*, 21 Ind. 280; *Barton v. Allbright*, 29 Ind. 489; *Ohio & Miss. R. W. Co. v. Alvey*, 43 Ind. 180; *King v. Vance*, 46 Ind. 246; *Greerman v. Fox*, 54 Ind. 267; *Earl v. Matheney*, 60 Ind. 202; *McCoid v. Beatty*, 12 Iowa 299; *Stevens v. Pugh*,

When is a bill transferred.—On a controversy between an attaching creditor on the one hand, and one claiming to be the holder of the bill for value on the other, the question to be determined was when the latter became the holder of the bill. The bill had been mailed to the claimant but had not reached him on the day the attachment was levied. The court held that so soon as the bill was

The maker of undue negotiable paper is bound to pay the amount represented by it at maturity to whomsoever may then be the owner and holder of it. Therefore, no notice to him need be given of the transfer of such an instrument to fix his liability to the holder, and for that reason a garnishment in a suit against any other person than the holder will be ineffective, although the garnishee have no notice of the transfer.¹ This rule is sometimes modified by special statutes by which the maker of a negotiable promissory note remains liable on garnishment process in a suit against the payee, although the note may have been negotiated, if the maker has not been notified of the transfer of the note. After notice of the transfer he will then remain liable to the transferee until notice of a further transfer is given to him.²

§ 570. (g) **Must be payable in money.**—Following the rule that in order to hold a garnishee liable, the contract relation existing between him and the principal defendant must be one on which the latter might have brought an action of debt or *indebitatus assumpsit*,³ the maker of a promissory note must be under obligation to pay the same in money. Therefore, where

12 Iowa 430; *Lake v. Reed*, 29 Iowa (Ala.) 175; *Kauffman v. Jacobs*, 49 258; *Yocum v. White*, 36 Iowa 288; Iowa 432; *Howry v. Eppinger*, 34 Walters v. Washington Ins. Co., 1 Mich. 29; *Speight v. Brock*, 1 Freem. Iowa 404; *Dickey v. Fox*, 24 Mo. 217; (Miss.) Ch. 389. *Fay v. Jones*, 18 Barb. (N. Y.) 340; *Ward v. Morrison*, 25 Vt. 593.

In some states notice after service and before answer, of an assignment made before the time of service, will bind the maker to the holder and defeat the garnishment, unless the garnishee omit to bring the assignment to the notice of the court, in which case he may subject himself to double payment of the debt. *Lewis v. Dunlop*, 57 Miss. 130; *Crayton v. Clark*, 11 Ala. 787.

1. *Lamkin v. Phillips*, 9 Porter (Ala.) 98; *Colvin v. Rich*, 3 Porter,

2. *Britton v. Preston*, 9 Vt. 257; *Kimball v. Gay*, 16 Vt. 131; *Barney v. Douglass*, 19 Vt. 98; *Stearns v. Wisley*, 30 Vt. 661; *Webster v. Morantville*, 30 Vt. 701; *Williams v. Shepherd*, 33 Vt. 164; *Seward v. Garlin*, 33 Vt. 583.

A notice which will be sufficient to prevent the debtor from making payment to his creditor will be sufficient to protect him from liability under process of garnishment. *Downer v. Marsh*, 28 Vt. 558.

3. *Ante*, §§ 475-482.

it was to be paid in "goods,"¹ or in "board,"² or in "iron,"³ or in "whisky,"⁴ or in specific personal services,⁵ the maker can not be held liable in garnishment. Nor can he be held liable when he has promised to pay a debt in promissory notes or written obligations.⁶

§ 571. (h) **Must be payable in the state.**—Following the general rule, governing not only attachment by direct seizure,⁷ but by garnishment as well,⁸ that a fund of property can not be appropriated by a court unless the same is within the jurisdiction of that court, the courts will not, generally, permit the maker of a negotiable instrument to be held as a garnishee unless by the terms of such instrument it is payable in the state in which the garnishee is brought into court.⁹ Furthermore, in determining the liability of a garnishee upon negotiable instruments, the courts follow the law of the state wherein the same is made payable.¹⁰

§ 572. (i) **Must not be due upon contingency.**—Following another general rule,¹¹ the sum of money represented by the negotiable instrument must be, or to become due absolutely and not upon a contingency; for in such a case the maker can not be held liable by service of process of garnishment upon him.¹² It must be such a contingency as will render the in-

1. *Clark v. King*, 2 Mass. 524.
2. *Aldrich v. Brooks*, 25 N. H. (5 Fost.) 241.
3. *Miller v. McClain*, 10 Yerger (Tenn.) 245.
4. *Weil v. Tyler*, 43 Mo. 581.
5. *Aldrich v. Brooks*, 25 N. H. 241.
6. *Marshall v. Grand Gulf, etc., Co.*, 5 La. Ann. 360; *Fuller v. O'Brien*, 121 Mass. 422.
7. *Ante*, §§ 6, 191, 200.
8. *Ante*, §§ 489, 490.
9. *Perry v. Coates*, 9 Mass. 537; *Kibling v. Burley*, 20 N. H. 359; *Chad-*

- bourn v. Gilman*, 63 N. H. 353; *Carbee v. Mason*, 64 N. H. 10, 4 Atl. Rep. 791; *Gaffney v. Bradford*, 2 Bailey (S. C.) 441; *Baylies v. Houghton*, 15 Vt. 626; *Ludlow v. Bingham*, 4 Dall. 47.
10. *Lee v. Selleck*, 33 N. Y. 615; *Emerson v. Partridge*, 27 Vt. 8.
11. *Ante*, § 481.
12. *Legro v. Staples*, 16 Me. 252; *Williams v. Marston*, 3 Pick. (Mass.) 65; *Morse v. Colley*, 17 N. H. 490; *Burke v. Whitcomb*, 13 Vt. 421.

debtedness uncertain and not merely an uncertainty as to time of payment.¹

§ 573. (j) **Notes held as collateral security.**—It frequently happens that the payee of a promissory note has delivered or transferred such notes in pledge or as security for some indebtedness, and his creditor (the plaintiff) nevertheless desires to secure the proceeds of the same to the satisfaction of his demand. Under the general rule governing attachments,² property held in pledge, or as security, can not be reached; and for this reason, as well as by force of special statutes, notes that have been given in pledge or delivered as security for an indebtedness can not be appropriated by bringing in the holder by the service of process of garnishment upon him, unless there will be a surplus after his debt is satisfied. In such case the surplus may generally be garnished.³

§ 574. **As to accepted drafts.**—It is a well known rule of the law merchant, that a bill of exchange, when accepted by the drawee, becomes an assignment of so much of the fund in his hands as is called for by such bill of exchange. Therefore, after the acceptance of a draft the acceptor may be made a garnishee in a suit against the payee under the same rules that govern the makers of promissory notes; for, by acceptance, he is placed in the identical position of a maker of a promissory note. In general the acceptance must be before service of process of garnishment, for otherwise there is no existing indebtedness at the time of service as required by the rule.⁴ Before a bill of

1. *Fay v. Smith*, 25 Vt. 610.

A contract reciting, "I am at my option about paying the principal of this note while I pay the interest annually," was held to be attachable. *Fay v. Smith*, 25 Vt. 610.

2. *Ante*, §§ 38, 42, 43.

3. *Howe v. Jones*, 57 Iowa 130; *Montross v. Byrd*, 6 La. Ann. 518; *Curtis v. Norris*, 8 Pick. (Mass.) 280; *Cushman v. Haynes*, 20 Pick. (Mass.)

132; *Grant v. Shaw*, 16 Mass. 341; *Brainard v. Reavis*, 2 Mo. App. 490; *Nicholson v. Walker*, 25 Mo. App. 368; *Wiggin v. Lewis*, 19 N. H. 548; *Fling v. Goodall*, 40 N. H. 208; *Perrin v. Russell*, 33 Vt. 44; *Sargent v. Wood*, 51 Vt. 597. Compare *Grosvenor v. Farmers', etc., Bank*, 13 Conn. 104; *Huot v. Ely*, 17 Fla. 775.

4. *Jarvis v. Wilson*, 46 Conn. 90; *Baer v. English*, 84 Ga. 403; *Poydras*

exchange is accepted there is no assignment of the fund, and such fund may be reached by garnishment issued in an action against the drawer.¹

Money paid in the purchase of a bill of exchange.—Where a debtor pays a sum of money for the purchase of a draft for the purpose of remitting the same to his debtor, the latter may be made the principal defendant in an action, and the fund reached by process of garnishment served upon the holder of the fund. Such fund can not be deemed a chose in action for the purpose of exempting it from garnishment.² But it can not be reached in a suit against the purchaser.³

§ 575. *As to corporate bonds.*—Corporate bonds are “property” and may be reached by process of garnishment served upon the corporation, when the bonds are in its possession

v. Delamare, 13 La. 98; *Ealer v. McAllister*, 14 La. Ann. 821; *Robbins v. Bacon*, 3 Me. 346; *Sebor v. Armstrong*, 4 Mass. 206; *Kimball v. Donald*, 20 Mo. 577; *Lunt v. Bank of North America*, 49 Barb. (N. Y.) 221; *Luff v. Pope*, 5 Hill (N. Y.) 413; *Pope v. Luff*, 7 Hill (N. Y.) 577; *Brazier v. Chappell*, 2 Brev. (S. C.) 107; *Storm v. Cotzhausen*, 38 Wis. 139; *Tucker v. Marsteller*, 1 Cranch Cir. Ct. 254; *ante*, § 476.

The local rules regarding acceptance, whether necessarily to be in writing or whether it may be oral, must be observed.

Where the payee of an acceptance transfers the same, it is governed by the rules hereinbefore laid down (*ante*, §§ 567-569) and may be garnished accordingly. *Dyer v. McHenry*, 13 Iowa 527.

1. *Sands v. Matthews*, 27 Ala. 399.

An owner can not defeat the rights of a creditor who has attached a bill of exchange as the property of the debtor, by giving an order on the hold-

er of the bill to some third party. *Ober v. Matthews*, 24 La. Ann. 90.

Written orders to pay a fund.—A written order upon a debtor to pay a certain amount of money to the payee named, may become an assignment thereof by acceptance. *Wilson v. Carson*, 12 Md. 54. But it is governed by the rules relating to choses in action unmodified by the law merchant. *Ante*, § 537, *et seq.* Therefore, where, for a valid consideration, an order is drawn for the whole of a particular fund, it is an equitable assignment thereof to the person named as payee. Such assignment will be valid against an attaching creditor if made before an attachment, although the garnishee did not have notice of it until after the attachment, provided he had notice in sufficient time to be enabled to disclose it by his affidavit before judgment. *Lee v. Robinson*, 15 R. I. 369, 5 Atl. Rep. 290.

2. *Moursund v. Priess*, 84 Tex. Sup. 554, 19 S. W. Rep. 775.

3. *Capital City Bank v. Parent*, 134 N. Y. 527, 31 N. E. Rep. 976.

ready for delivery to the principal defendant, but where the process is served before the directors have authorized the issue of the bonds, such bonds can not be held under a statute which does not hold the garnishee for property coming into his hands after the service of process. In such a case the after-issued bonds are not property in the hands of the garnishee at the time of service.¹ The rule that the payor of negotiable paper can not be garnished by the creditor of the payee unless the paper is in the hands of the payee and past due, does not apply in cases seeking to garnish mortgage bonds of corporations.²

§ 576. **A mere custodian of a note or bill can not be held as a garnishee.**—One who, merely as an agent, trustee, or custodian, has in his keeping promissory notes, checks, bills of exchange, or other evidences of indebtedness and choses in action, can not be held liable as a garnishee in a suit against the owner of the same,³ unless the same be treated as

1. *Fidelity Insurance, Trust and Safe-Deposit Co. v. Shenandoah Val. R. Co.*, 33 W. Va. 761, 11 S. E. Rep. 58; *Pennsylvania Railroad Co. v. Pennock*, 51 Pa. St. 244; *Marble Falls Ferry Co. v. Spitler*, (Tex. Civ. App.) 25 S. W. Rep. 985.

2. *Marble Falls Ferry Co. v. Spitler*, (Tex. Civ. App.) 25 S. W. Rep. 985.

Interest coupons.—Coupons or notes for the payment of interest on corporate bonds are, in some states, treated as negotiable instruments—*Arents v. Commonwealth*, 18 Gratt. (Va.) 750—while in others they are deemed to be choses in action, and proceedings in attachment to subject them are governed accordingly. *Smith v. Kennebec, etc.*, R. R. Co., 45 Me. 547.

Coupons indicating the amount of work done at a factory and the sum of money due thereon, are evidence of indebtedness, and when assigned with the knowledge and consent of the payor, such assignment will defeat an

attachment at suit of the assignor's creditor. *Stinson v. Caswell*, 71 Me. 510.

3. *Levisohn v. Waganer*, 76 Ala. 412; *VanWinkle v. Iowa, etc., Co.*, 56 Iowa 245; *Clark v. Viles*, 32 Me. 32; *Dickinson v. Strong*, 4 Pick. (Mass.) 57; *Maine Ins. Co. v. Weeks*, 7 Mass. 438; *Perry v. Coates*, 9 Mass. 537; *Lupton v. Cutter*, 8 Pick. (Mass.) 298; *Gore v. Clisby*, 8 Pick. (Mass.) 555; *Mayhew v. Scott*, 10 Pick. (Mass.) 54; *Tucker v. Clisby*, 12 Pick. (Mass.) 22; *Osborne v. Schutt*, 67 Mo. 712; *Fletcher v. Fletcher*, 7 N. H. 452; *Raiguel v. McConnell*, 25 Pa. St. 362; *Gilmore v. Carnahan*, 81½ Pa. St. 217; *Hanaford v. Hawkins*, (R. I.) 28 Atl. Rep. 605; *Moore v. Pillow*, 3 Humph. (Tenn.) 448; *Price v. Brady*, 21 Tex. 614; *Tirrell v. Canada*, 25 Tex. 455; *Ellison v. Tuttle*, 26 Tex. 283; *Scofield v. White*, 29 Vt. 330; *Van Amee v. Jackson*, 35 Vt. 173.

But in Louisiana notes are attach-

cash.¹ In the absence of special statute this rule applies to agents or custodians having the instrument for collection,² or for sale.³

The maker of such a note may be held as a garnishee in an

ble by direct seizure when in the hands of third persons. *Erwin v. Commercial, etc., Bank*, 3 La. Ann. 186; *Conery v. Webb*, 12 La. Ann. 282. And the fact that an order has been given upon the person having the same for collection, to pay the proceeds when collected to a person named, does not constitute an assignment of the fund, although the order has been accepted by the attorney, and as long as the notes remain uncollected in the hands of the attorney they may be attached as the property of the owner. *Robertson v. Scales*, 15 La. Ann. 545.

1. *Hanaford v. Hawkins*, (R. I.) 28 Atl. Rep. 605.

2. *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S. E. Rep. 160; *Cooper v. McClun*, 16 Ill. 435; *First Nat. Bank v. Leppel*, 9 Colo. 594.

Where one in possession of notes is, by statute, made liable as a garnishee, he can not relieve himself from such liability by thereafter returning the notes to the principal defendant. *Stevens v. Dillman*, 86 Ill. 233; *Bowen v. Pope*, 26 Ill. App. 233, 125 Ill. 28.

In Colorado, to hold a bank, in which a note is deposited for collection, liable as a garnishee with respect to that note, a special notice is necessary specifying the particular note in question as the property of some other person than the depositor. *First Nat. Bank v. Leppel*, 9 Colo. 594.

In New York, when a draft is given by the drawer to an agent to be forwarded to a third person for collection, it is subject in the hands of the third person upon a debt due from the

drawer. *Naser v. First Nat. Bank*, 116 N. Y. 492, 22 N. E. Rep. 1077.

Where one to whom notes have been indorsed for collection may be made a garnishee, the garnishment does not interfere with his right to use and collect such notes and bills until an order is made requiring such choses in action to be delivered to the sheriff or a receiver for such property appointed under the statute, and the fact that the plaintiff who has sued on such notes has been summoned as a garnishee can not, in general, be set up as a defense by the person sued on the note. *Bank of Missouri v. Bredow*, 31 Mo. 523.

The pendency of process is not a bar to an action by the indorsee against the maker. It is a matter of abatement at most, but it furnishes just ground for an application to the court to continue the cause till the result of the trustee process is known. *Peck v. Maynard*, 20 N. H. 183. And the fact that such a garnishee has brought a suit in another court upon the note and filed it there, will not defeat the garnishment. *Trunkey v. Crosby*, 33 Minn. 464.

In Louisiana, a note or draft which has been sued upon and filed with the clerk may be reached by garnishment process served upon the clerk of the court in whose custody the instrument is, and proved by his answers to interrogatories that the instrument is in his possession. *Ealer v. McAllister*, 14 La. Ann. 821; *Estate of Mille v. Hebert*, 19 La. Ann. 58; *Lassiter v. Bussy*, 14 La. Ann. 699.

3. *Paul v. Paul*, 10 N. H. 117.

action against the payee under the rules hereinbefore laid down, because neither the delivery for collection nor instructions to the agent to pay the proceeds when collected to certain creditors will operate as an assignment or transfer of such notes.¹

After notes have been paid, however, the relationship of a debtor and creditor arises between the person who was custodian or agent for collection and the one who owned the notes, and thereafter before payment such debtor may be held as a garnishee in a suit against his creditor. Bank bills so held are to be treated as money or property;² and so are United States treasury notes.³

§ 577. When contract of bailment exists—(a) Accommodation bailees.—It is not intended herein to treat of all manner of contracts which might be strictly considered as contracts of bailment, for they are so much interwoven with other conditions, that a treatment of them will be found elsewhere. It is only intended to indicate the general rules governing contracts of bailment.

An accommodation bailee occupies a unique position and because thereof has frequently been deemed to be free from liability upon the process of garnishment. But the better rule would seem to be that, although he is not to be compensated for his services, he is nevertheless liable for any gross neglect, and for that reason and inasmuch as he is responsible for the property in his possession to that extent he should be held liable as a garnishee. Therefore, one having a large box for safe keeping was held as a garnishee, although he had declined to be responsible for it.⁴ So one having possession of cotton under a contract of bailment merely, was held liable by a creditor of one to whom it should have been delivered when it was wrongfully delivered to another.⁵ Even a mere depository

1. *Clark v. Cilley*, 36 Ala. 652.

2. *Morrill v. Brown*, 15 Pick. (Mass.) 173.

3. *State v. Lawson*, 7 Ark. 391.

4. *Loyless v. Hodges*, 44 Ga. 647.

5. *Smith v. Picket*, 7 Ga. 104.

But on the contrary it has been held that one permitting shingles to remain in his shed could not be held as a garnishee; *Stickney v. Batchel-*

of choses in action has been held as a garnishee.¹ Likewise a receptor of property which has theretofore been taken on an attachment,² may be held liable in garnishment where such property has not been taken in execution and disposed of in due course of law.³ Furthermore (but partly controlled by a different rule) a stake-holder of a bet or wager may be held as a garnishee in a suit against the person to whom such fund belongs.⁴

§ 578. (b) **Bailees for hire.**—There is no exception to the rule that attachment by direct seizure, and not by garnishment, is the proper proceeding where the defendant is himself in possession of the property, and this rule applies where a third person who is the mere agent of the defendant has custody of the property; and again, so long as he has a right of possession or an unsatisfied lien it can not be taken from him, nor can he be held liable for the value of it.⁵ But where the bailee is not a mere agent of the defendant and has money or property in his possession on which he has no lien and of which he has no further right of possession, he may be held as a garnishee in a suit against the owner.⁶ The same rules apply as in other cases where the garnishee holds a fund or property to which the principal defendant is entitled or (in some states) to become entitled.⁷ Property entrusted to the custody of com-

der, 18 N. H. 40; nor could bank officials or other bailees of a trunk or box that was put in its vault for safe keeping merely; its contents being unknown to them. *Bottom v. Clarke*, 7 Cush. (Mass.) 487; *Hooper v. Day*, 19 Me. 56.

1. *Elser v. Rommel*, 98 Mich. 74. *Contra*, *Mayhew v. Paine*, 42 Me. 296.

2. *Ante*, §§ 264, 265.

3. *Cole v. Wooster*, 2 Conn. 203.

4. *Reynolds v. McKinney*, 4 Kan. 94; *Ball v. Gilbert*, 12 Metc. (Mass.) 397; *Clark v. Gibson*, 12 N. H. 386; *Speise v. M'Coy*, 6 Watts. & S. (Pa.) 485.

Horses and carriages in the possession of a livery stable keeper or other

bailee either for accommodation or for hire do not make such bailee liable to process of garnishment. Such property should be seized by direct attachment. *Hall v. Filter Manuf. Co.*, 10 Phila. (Pa.) 370.

5. *Ante*, § 548.

6. As to property subject to lien, see *post*, § 584.

7. The rule was applied in a case where a boom company had possession of the defendant's logs for safe keeping on an agreement that they were to receive an agreed price for the same. *Farmers', etc., Bank v. Welles*, 23 Minn. 475. Compare *Wheeler v. Day*, 23 Minn. 545.

mon carriers is more often sought to be subjected to process of garnishment served upon such common carrier than in case of any other class of bailees for hire.

Property delivered to a common carrier, upon the contract that such carrier is to deliver it to a third person indicated, is then beyond the reach of process of garnishment issued in a suit against the consignor, because the presumption of law is that the property belongs to the person to whom it is consigned.¹ But where property is consigned to an agent of the consignor it is subject to process of garnishment while still in the constructive possession of the consignor and will be subject to garnishment, although stored in the United States Custom House.² Furthermore, the consignee (other than the owner) of goods in the hands of a common carrier does not become chargeable as a garnishee of the consignor until he has accepted the consignment and received the goods.³ Nor can he then become chargeable as the garnishee when the consignment was made to him with instructions to pay the proceeds of the sale of them to a third person, who accepts such stipulation in his favor. By acceptance the instructions become an assignment of the property.⁴

A carrier who has received money from a debtor to be delivered to a third person has been held liable as a garnishee in a suit against a third person to whom the same was to have been delivered.⁵

1. Redd v. Burrus, 58 Ga. 574; Bingham v. Lamping, 26 Pa. St. 340.

2. Peabody v. Maguire, 79 Me. 572, 12 Atl. Rep. 630.

3. Grant v. Shaw, 16 Mass. 341.

An assignment and delivery of a bill of lading and invoice of goods *in transitu* for a good and valuable consideration conveys title thereto and the goods are not attachable as the property of the assignor. Balderston v. Manro, 2 Cranch Cir. Ct. (U. S.) 623.

4. Price v. Bradford, 4 La. 35; Dolson v. Brown, 13 La. Ann. 551.

5. Adams v. Scott, 104 Mass. 164; Hearn v. Foster, 21 Tex. 401.

But where the carrier was instructed to tender such money to one agent of the person to whom it was due and upon his refusal to receive it, to carry it to another city and there tender it to another agent of the same creditor, the carrier was held liable as garnishee in an action against the consignor after the first agent had refused and before the second had been given an opportunity to do so. Union Mut. Life Ins. Co. v. Holbrook, 4 Gray (Mass.) 235.

The general rule, however, regarding property in the hands of a common carrier while *in transitu*, is, that the same can not be made the subject of garnishment,¹ especially when the property is, at the time, outside of the state in which the suit is brought.² But where the property has reached its destination and the possession of the carrier is only that of a warehouseman, the carrier may be held liable as a garnishee in respect to such property.³ The carrier can, in no case, however, be held liable as a garnishee when he does not know whether the goods belong to the defendant or not.⁴

The consignee of goods entrusted to a common carrier is, where he has accepted the consignment, liable to the carrier for freight; therefore he may be held as a garnishee in an action brought against the carrier, but not before the entire cargo or consignment has been delivered.⁵ But one who receives goods from the last of several connecting lines of carriers can not be held liable for the freight due any but the last, although it has been the custom of the lines for the first receiving the goods to charge freight to the succeeding one, the whole to be collected by the line delivering the goods.⁶ The consignee can not be held liable as a garnishee for the amount of the freight in a suit against the master of the vessel, unless such freight is the property of the master and not the owners.⁷

1. *Western R. R. Co. v. Thornton*, 60 Ga. 300; *Illinois Central R. R. Co. v. Cobb*, 48 Ill. 402; *Michigan Central R. R. Co. v. Chicago, etc., R. R. Co.*, 1 Ill. App. 399; *Bates v. Chicago, etc., Ry. Co.*, 60 Wis. 296, s. c. 50 Am. Rep. 369.

The rule is applied to a passenger's baggage while *en route* in the case of *Western R. R. Co. v. Thornton*, 60 Ga. 300.

2. *Western R. R. Co. v. Thornton*, 60 Ga. 300; *Montrose Pickle Co. v. Dodson & Hill's Mfg. Co.*, 76 Iowa 172, 40 N. W. Rep. 705.

That the property must be in the jurisdiction of the court, see *ante*, §§ 489 and 490.

3. *Cooley v. Minnesota Transfer Ry. Co.*, 53 Minn. 327, 55 N. W. Rep. 141.

4. *Walker v. Detroit, Grand Haven, etc., R. R. Co.*, 49 Mich. 446.

5. *Stirling v. Loud*, 33 Md. 436; *Gould v. Newburyport R. R. Co.*, 14 Gray (Mass.) 472; *Lewis v. Hancock*, 11 Mass. 72; *Shumway v. Clark*, 114 Mass. 103; *Peterson v. Loring*, 135 Mass. 397.

6. *Gould v. Newburyport R. R. Co.*, 14 Gray (Mass.) 472.

7. *Stirling v. Loud*, 33 Md. 436; *Richardson v. Whiting*, 18 Pick. (Mass.) 530.

§ 579. When funds deposited in bank—(a) Generally.—In the absence of a United States statute forbidding attachments issuing out of state courts against national banks,¹ any bank may be held as a garnishee of the principal defendant when the relationship of debtor and creditor exists between them.² When funds are deposited in a bank and by it credited to the depositor, the bank becomes the debtor of such depositor and liable as such. And when the bank receives such deposits, to be paid upon checks generally, it remains liable to the depositor until it accepts or promises to pay a check drawn, or until some other special arrangement is made; and until such time it is liable to process of garnishment issued in an action against the depositor.³ The fact that the depositor is insolvent, of itself has no effect to defeat process of garnishment served upon the bank in which such deposit is made.⁴

The true test is that so long as the principal defendant him-

1. For an interpretation of such a statute when in force, see *Pacific Nat. Bank v. Mixer*, 124 U. S. 721; *Safford v. National Bank*, 61 Vt. 373.

2. As to corporations in general being made garnishees, see *ante*, § 492.

3. *Mayer v. Chattahoochee Nat. Bank*, 51 Ga. 325; *Nichols v. Goodheart*, 5 Ill. App. 574; *Ham v. Peery*, 39 Ill. App. 341; *Clark v. Hancock Bank*, 1 Allen (Mass.) 394; *Boston, etc., Railroad v. Oliver*, 32 N. H. 172; *Skinner v. Stuart*, 39 Barb. (N. Y.) 206; *Hemp-hill v. Yerkes*, 132 Pa. St. 545; *Farmers', etc., Nat. Bank v. Ryan*, 64 Pa. St. 236; *Farmers, etc., Bank v. King*, 57 Pa. St. 202; *Rozelle v. Rhodes*, (Pa.) 9 Atl. Rep. 160.

Although the indebtedness may be evidenced by a certificate of deposit payable to the order of the creditor on "demand," yet no demand is necessary before the service of process of garnishment. *Ham v. Peery*, 39 Ill. App. 341.

Pension money deposited in bank be-

comes liable to process of garnishment served upon the bank, although the same was, by a United States statute, exempt from attachment and garnishment before it was received by the pensioner. *Webb v. Holt*, 57 Iowa 712.

Mistake in entries upon books.—A bank is not concluded in a garnishment proceeding by an entry upon its books as to the credit of the principal defendant. They may show the same to be a mistake and may show that no deposit was in fact made on his account. *Boston, etc., R. R. Co. v. Oliver*, 32 N. H. 172.

Bank indebted to a deceased wife can not be held as a garnishee in a suit against the surviving husband. And the fact that she in her lifetime assigned the debt to the plaintiff will not affect the case. *Chick v. Agnew*, 111 Mass. 266.

4. *Penrose v. Erie Canal Co.*, 3 Phil. (Pa.) 198.

self has a right to call upon the bank for the fund, the bank may be held as a garnishee at suit of the depositor's creditor, but the bank can be placed in no worse position by force of the process, nor can the plaintiff be placed in a better position than the depositor.¹

The cashier of a bank can not be held liable as a garnishee in a suit against the depositor because the cashier is not the debtor of the depositor.² Not even if he be also the treasurer of the principal defendant corporation and himself deposited the funds in the bank as such treasurer.³

After a check has been deposited with a bank by the payee, to whom, according to a custom assented to by him, it is credited on the books of the bank as so much cash, the title to such check becomes vested in the bank and thereafter the drawer of the check can not be held as the garnishee in a suit against the payee, because he no longer owes the payee, but is indebted to the bank.⁴

§ 580. (b) When deposited by one as "agent" or other fiduciary.—When a fund is deposited in a bank to the credit of the depositor as "agent" it is *prima facie* the property of the principal, and thereafter will not generally be liable to

1. Jackson v. Bank of U. S., 10 Pa. St. 61; ante, §§ 471-475.

2. Lewis v. Smith, 2 Cranch Cir. Ct. 571.

3. Sprague v. Steam Navigation Co., 52 Me. 592.

In Illinois where a banker himself had absconded, a cashier was held liable as a garnishee when he had promissory notes belonging to his principal. By garnishment the attaching creditor took priority over all subsequent claims. Nolte v. Von-Gassy, 15 Ill. App. 230.

Specific deposits.—It has been held that by a specific deposit of coin, the depositary does not become the debtor of the depositor and for that reason not liable in garnishment. Wood v.

Edgar, 13 Mo. 451. But this rule would not obtain where the bank had credited the depositor on its general account with so much cash.

The answer.—When process of garnishment is served upon a bank, the president is the only proper person to answer. Sturgis v. Rogers, 26 Ind. 1.

The cashier of any corporation or association has not ordinarily the power to defend suits against such corporation. Consequently he can not answer a garnishment against it. If the corporation have a seal, the answer should be made under the seal of such corporation. Branch Bank v. Poe, 1 Ala. 396.

4. National Park Bank v. Levy, 17 R. I. 746, 24 Alt. Rep. 777.

process of garnishment sued out in an action against the individual who has designated himself to be an "agent" or other representative person. It may be in a suit against the known principal. The name of the principal, however, should in all cases be stated in order to indicate positively the person to whom the bank is indebted on the account; for, although money be deposited in the name of one as agent or any other fiduciary capacity named, such designation will be considered to be only *descriptio personæ* when no other person is known to be the real owner and no claim is made to the account by any one other than the depositor. In such a case the fund may be garnished in a suit against the depositor himself. The bank can not dispute the right of its depositor, and, being bound to honor his demand, it will be bound by his creditor's when such creditor is subrogated to the rights of the depositor by the process of garnishment.¹

The fact that money is deposited in the depositor's individual name, and drawn out on his individual check is *prima facie* evidence that the money is his.²

The same rule applies to funds deposited by public officers in their individual names. If they designate their official capacity the property would be known to be a trust fund, but if they used their individual name merely, and there is no knowledge that it is not the depositor's individual money, the fund may be garnished in a suit against him, and thereafter, in the absence of statutory provision, he can not recover the fund.³

1. *Morrill v. Raymond*, 28 Kan. 415, s. c. 42 Am. Rep. 167; *Ingersoll v. First, etc., Bank*, 10 Minn. 396; *Cohen v. St. Louis Perpetual Ins. Co.*, 11 Mo. 374; *Gregg v. Farmers' & Merchants' Bank*, 80 Mo. 251; *Simmons v. Almy*, 100 Mass. 239; *Raynes v. Lowell, etc., Soc.*, 4 Cush. (Mass.) 343; *Randall v. Way*, 111 Mass. 506; *Hemphill v. Yerkes*, 132 Pa. St. 545; *Farmers', etc., Bank v. King*, 57 Pa. St. 202; *Bank of Northern Liberties v. Jones*, 42 Pa. St. 536; *Paxson v. Sanderson*,

3 Phil. (Pa.) 303; *Proctor v. Greene*, 14 R. I. 42.

2. *Boatmen's Savings Bank v. Over-all*, 16 Mo. App. 510.

3. *Long v. Emsley*, 57 Iowa 11; *Hurd v. Farmers' Loan and Trust Co.*, 63 How. (N. Y.) Pr. 314; *First Nat. Bank v. Gandy*, 11 Neb. 431.

A ward's money was deposited in a bank designating himself as "—— guardian of ——," and the fund was reached by process of garnishment served upon the bank in a suit against

One who, as an agent or attorney for collection, deposited certain drafts, belonging to his principal, in a bank, can not be held as a garnishee in a suit against his principal,¹ before the drafts are collected, although they be credited to him absolutely on the books of the bank, and the bank be willing, upon the credit of the depositor, to pay at an earlier time.² However, one who deposits in a bank a sum of *money* due from him to the principal defendant, although the same be subject to his own order, may be held as a garnishee, even though the plaintiff requested him so to do and agreed that he should incur no responsibility.³

Where a depositor places money in a bank, payable to the order of a third person to whom a certificate of deposit is issued, the bank is indebted to such third person, and may be held as a garnishee in a suit against him.⁴

the ward. *Simmons v. Almy*, 100 Mass. 239.

Likewise a fund deposited by "—— in trust for the —— society" was secured by garnishment in a suit against the society. *Raynes v. Lowell*, etc., Soc. 4 Cush. (Mass.) 343.

But where the bank has given an individual credit in his own name and has "certified" checks drawn against that fund, the bank can not thereafter be held liable in a suit against a third person, even though it be made to appear that the money was really the property of such third person, and that the depositor placed the amount in the bank and got the check certified to the amount of the deposit for the purpose of preventing the money from being reached by the creditors of such third person, there being no fraud or collusion on the part of the bank. *Greenleaf v. Mumford*, 50 Barb. (N. Y.) 543.

Where a statute forbids a county treasurer to deposit public funds in any bank, a fund so deposited may be reached by garnishment in a suit

brought by one of his individual creditors. *First Nat. Bank v. Gandy*, 11 Neb. 431.

Where money was deposited in a bank by a comptroller to meet interest that would be due next day on city bonds, and the bank accepted it for that *specific purpose*, the fund is not attachable at suit of a general creditor of the city. *Hurd v. Farmers' Loan and Trust Co.*, 63 How. (N. Y.) Pr. 314.

Furthermore, where a bank knows a fund to belong to a firm which is insolvent, and where a note of an individual member of a firm to the bank is by him paid out of funds of the firm, the bank is chargeable with the funds so received, because it should have regarded the same as the property of the firm and so held it. *Johnson v. Hersey*, 70 Me. 74.

1. *Ante*, § 576.

2. *Moors v. Goddard*, 147 Mass. 287, 17 N. E. Rep. 532.

3. *Hancock v. Colyer*, 103 Mass. 396.

4. *Exchange Bank v. Gulick*, 24 Kan. 359.

§ 581. (c) **As to funds transferred to a bank as collateral security.**—When funds are transferred to a bank as collateral security for an indebtedness of the depositor to the bank, the ordinary rule that property held as security or in pledge can not be secured by attachment, except as to the surplus after the lien is satisfied, applies.¹

§ 582. (d) **As to checks drawn before service and presented after.**—When a fund is deposited in a bank on a general account, the bank becomes a debtor and the depositor a creditor, and they then are governed by the ordinary rules of law relating to debtors and creditors. A check drawn by the depositor is a mere request that the bank pay the bearer, or on the order of the payee. Until such check is presented it is in-

1. *Ante*, § 554, and *post*, § 584.

Where a bank held a note against the depositor, which note was secured by mortgage, and the bank purchase an equity of redemption at a sheriff's sale, releasing to the mortgagor a portion of the real estate covered by the mortgage, in consideration of which he paid a sum of money, the bank indorsing the same upon the note, it was held that the bank could not be charged as a garnishee for the money so received. *Flagg v. Bates*, 65 Me. 364.

The city of Milwaukee issued bonds in aid of a railway and took a second mortgage of the road as security. After the road was sold under a first mortgage, a surplus remained to satisfy the second mortgage. The city then set apart that fund received upon its second mortgage toward the payment of the bonds given to aid the road. It was held that the funds in the bank awaiting investment were beyond the reach of process of garnishment at suit of a judgment-creditor of the city. *Terry v. Wisconsin, etc., Bank*, 18 Wis. 87; *post*, § 644.

A debtor pledged certain stock as collateral security to a bank for a specific debt. He then wrote a letter to the bank directing it "to hold the stock as a general collateral security for all the writer's liabilities to the said bank at present existing or which may thereafter be incurred by him." It was held that the bank was authorized to apply the proceeds of the stock to the satisfaction of the specific debt and thereafter to apply the surplus *pro rata* to all the depositor's liabilities. *Eichelberger v. Murdock*, 10 Md. 373.

A depositor, indebted to a bank, transferred certain stock to "the cashier" without condition, but intended the same as collateral security for his liabilities to the bank. The cashier was held as a garnishee for the surplus remaining after the stocks were applied to the satisfaction of the depositor's indebtedness to the bank. *New England, etc., Ins. Co. v. Chandler*, 16 Mass. 275; *Clapp v. Hancock Bank*, 1 Allen (Mass.) 394.

choate and vests no title or interest in the payee to the fund. The bank has a right to consider the deposits as belonging to the depositor till notice is given of its transfer. Therefore, upon principle, a bank is liable as a garnishee in a suit against the depositor to the extent of the fund in the possession of the bank at the time such process of garnishment is served upon it; and although a check may have been previously drawn, yet if it is not presented until after the process is served, the bank may be nevertheless held as a garnishee.¹

Checks upon banks are governed by the rule which obtains in case of bills of exchange. A draft is not an assignment of the fund in the hands of the drawee until it is by him accepted.²

Where a bank has "certified" a check for the amount of its deposit it will not be subject to garnishment in a suit against the drawer of the check because the bank, by certifying the check, has become the creditor of the drawee.³ But where the bank, with intent to assist the depositor in evading payment, connives at a transaction whereby the deposit is withdrawn with the pretense of paying a certified check, the bank will nevertheless be liable.⁴

After a draft has been purchased of a bank, and while the same is outstanding and no default has been made by the drawee, the money can not be garnished as belonging to the purchaser of the draft.⁵

§ 583. When funds placed in safety deposit vaults.—Moneys, securities or other property, stored in safes or boxes rented

1. *Mayer v. Chattahoochee National Bank*, 51 Ga. 325; *Terry v. Sisson*, 125 Mass. 560; *Duncan v. Berlin*, 60 N.Y. 151; *Gibson v. National Park Bank*, 98 N. Y. 87; *Harry v. Wood*, 2 Miles (Pa.) 327; *Nichols v. Schofield*, 2 R. I. 123; *Imboden v. Perrie*, 13 Lea (Tenn.) 504. Compare *Nat. Bank of America v. Indiana Banking Co.*, 114 Ill. 483.

Were it otherwise, what would prevent a principal defendant from post-

dating a check to a friendly creditor and thereby defeat the attaching creditor?

2. *Ante*, § 574.

3. *Bills v. Nat. Park Bank*, 47 N. Y. Super. Ct. 302.

4. *Gibson v. Nat. Park Bank*, 98 N. Y. 87.

5. *Capital City Bank v. Parent*, 134 N. Y. 527, 31 N. E. Rep. 976; *ante*, § 574.

from safety deposit vault companies are not, in the absence of special statute, attachable by direct seizure,¹ nor can they be held liable by process of garnishment served upon such company,² because they are not a debt due to the defendant; neither are they property in possession of the garnishee belonging to the defendant. The contents of the safe, box or other receptacle, to which the renter carries the key, is in the actual possession of the renter, and, therefore, not subject to garnishment under the general rules applying thereto.³

§ 584. When debt secured by mortgage, or property held as indemnity—(a) Generally.—It is a general principle that property held as indemnity for a debt which the owner owes to the person in possession of the property can not be secured by garnishment. This is because of the well known rule that the plaintiff is placed in no better position than the principal defendant was and can not recover against the garnishee where the principal defendant could not have recovered against such garnishee in an action at law.⁴ A garnishee is liable to the plaintiff no further than he was liable to the principal defendant before the process of garnishment was served.⁵ His contract rights can not be affected by garnishment.⁶ However, the general rule has been modified by special statutes permitting the garnishment of property secured by mortgage or held in pledge as indemnity for a debt or subject to any lien created by law, but in no case can the rights of the mortgagee or pledgee be in any manner abridged. Therefore no mortgagee or pledgee can be held liable by process of garnishment, unless or until his claim against the fund or property is first paid, satisfied and discharged.⁷ Until foreclosure or sale, by due process of

1. *Ante*, Vol. I.

2. *Ante*, §§ 577 and 578.

3. *Gregg v. Hilson*, 8 Phil. (Pa.) 91; *ante*, § 576.

4. *Ante*, § 487.

5. *St. Louis v. Regenfuss*, 28 Wis. 144; *Henry v. Wilson*, 85 Iowa 60, 51 N. W. Rep. 1157; *McKenzie v. Wilson*, 85 Iowa 60, 51 N. W. Rep. 1157.

6. *Daggett v. McClintock*, 56 Mich. 51.

7. *Nathans v. Giles*, 5 Taunton (Eng.) 558; *Edwards v. Beugnot*, 7 Cal. 162; *Winslow v. Fletcher*, 53 Conn. 390, s. c. 55 Am. Rep. 122; *Hall v. Page*, 4 Ga. 428; *Timmons v. Johnson*, 15 Iowa 23; *Davis v. Wilson*, 52 Iowa 187; *Holbrook v. Baker*, 5 Me. 309; *Sargent v.*

law, the mortgagor or pledgor has a right of redemption which may be reached by garnishment.¹

The garnishee can not be charged for any specific mortgaged or pledged property in his possession, but only for its value.² Garnishment does not create a lien upon property like attachment by direct seizure, but only creates a personal liability upon the garnishee to pay the amount of money adjudged to be due.³

§ 585. (b) **Surplus only can be reached.**—As a result of the foregoing principle it follows that whenever garnishment process is efficient to secure anything in the possession of one who has a lien upon the fund or property of the defendant, such process can reach only the surplus which remains after the mortgagee, pledgee or other person having a lien thereon has been fully paid the demand which is secured by his mortgage or by his possession of the property.⁴

Carr, 12 Me. 396; Hooton v. Gamage, 11 Allen (Mass.) 354; Burlingame v. Bell, 16 Mass. 318; Allen v. Megguire, 15 Mass. 490; Crippen v. Jacobson, 56 Mich. 386; Lyon v. Ballentine, 63 Mich. 97, 29 N. W. Rep. 837; Black v. Dawson, 82 Mich. 485, 46 N. W. Rep. 793; Cooley v. Minnesota Transfer Ry. Co., 53 Minn. 327, 55 N. W. Rep. 141; Aldrich v. Woodcock, 10 N. H. 99; Boardman v. Cushing, 12 N. H. 105; Blake v. Hatch, 25 Vt. 555.

The lien must, of course, be a lien prior to the attachment. Davis v. Wilson, 52 Iowa 187.

1. Becker v. Dunham, 27 Minn. 32; Danforth v. Roberts, 20 Me. 307.

And where equities of redemption are sought to be secured by process of garnishment it must be borne in mind that the interest must be an interest in the property within the state. Winslow v. Fletcher, 53 Conn. 390, s. c. 55 Am. Rep. 122; ante, § 489, et seq.

Where an equity of redemption is attached the debtor may remain passive and suffer the foreclosure to be

consummated. Danforth v. Roberts, 20 Me. 307.

2. Bufford v. Sides, 42 N. H. 495.

3. Ante, § 487.

Where there is nothing due nor likely to become due—as where an amount of money is to be paid at the death of a person still living—a farm being held as indemnity for the support of such person—the person holding the indemnity can not be held as a garnishee. Morey v. Sheltus, 47 Vt. 342.

Effect of deed absolute.—When a conveyance is made in the form of a deed absolutely although intended to be a mortgage, the grantee can not be held as a garnishee. Thompson v. Pennell, 67 Me. 159; Farwell v. Wilmarth, 65 Wis. 160. Although the instrument may be fraudulent. Thompson v. Pennell, 67 Me. 159.

4. Doggett, Bassett & Hills v. Bates, 26 Ill. App. 369; Glass v. Doane, 15 Ill. App. 66; Lightner v. Steinagel, 33 Ill. 510; Mississippi, etc., Ry. Co. v. U. S. Exp. Co., 81 Ill. 534; First Nat.

The fact that the mortgagor has failed to perform the condition specified in the mortgage to be by him performed, does not so far divest him of his right of redemption but that such right may be reached by process of garnishment served upon the mortgagee in possession, at suit of a creditor of the mortgagor and thereby to subject to the satisfaction of his demand whatever surplus may remain after the satisfaction of the mortgage.¹

No surplus can be secured by garnishment until the mortgaged debt is paid.²

After foreclosure, however, where the mortgagee has entered

Bank *v.* Armstrong, 101 Ind. 244; Davis *v.* Wilson, 52 Iowa 187; Hawthorn *v.* Unthank, 52 Iowa 507; Grow *v.* Crittenden, 66 Iowa 277; Buck-Reinier Co. *v.* Beatty, 82 Iowa 353, 48 N. W. Rep. 96; Bragunier *v.* The Beck, etc., Co., 41 Kan. 542, 21 Pac. Rep. 640; Kirkman *v.* Hamilton, 9 Martin (La.) 297; Rice *v.* Brown, 9 Cush. (Mass.) 308; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 400; Ripley *v.* Severance, 6 Pick. (Mass.) 474; Pierson *v.* Weller, 3 Mass. 564; Taft *v.* Bowker, 132 Mass. 277; Norton *v.* Piscataqua Ins. Co., 111 Mass. 532; Jewell Pure Water Co. *v.* Harkness, 49 Mo. App. 357; Aldrich *v.* Woodcock, 10 N. H. 99; Smith *v.* Packard, 19 N. H. 575; Chapman *v.* Gale, 32 N. H. 141; Nolen *v.* Crook, 5 Humph. (Tenn.) 312; McCown *v.* Russell, 84 Wis. 122, 54 N. W. Rep. 31; Chesapeake Guano Co. *v.* Sparks, 18 Fed. Rep. 281.

The lien must be a prior one.—The lien that will prevail against a garnishment must be a lien existing at the time of the service of process, for where personal property has been mortgaged to secure such sums of money as may thereafter become due, claims which accrue thereunder after the property is attached will not pre-

vail against the attachment. Bernard *v.* Moore, 8 Allen (Mass.) 273.

The lien must be permitted by law.—Money deposited as indemnity in cases where the same is not authorized by law (as money deposited with the sheriff to indemnify the plaintiff and to enable the defendant to retain the property) can not be held to the exclusion of the attachment. Such a fund is subject to attachment by garnishment. Johnson *v.* Mason, 16 Mo. App. 271.

Person in possession must have sold or have power of sale.—A pledgee without power to sell can not be held as a garnishee in a suit against the pledgor. Howard *v.* Card, 6 Me. 353; Thompson *v.* Stevens, 10 Me. 27; Hudson *v.* Hunt, 5 N. H. 538. There can be no surplus in such a case. If the law provides a means for selling the pledged property, then the surplus would be liable as in other cases.

1. Doane *v.* Garretson, 24 Iowa 351; Burnham *v.* Doolittle, 14 Neb. 214; Root *v.* Davis, 51 Ohio St. 29, 36 N. E. Rep. 669; McGregor *v.* Chase, 37 Vt. 225. *Contra*, Beckham *v.* Carter, 19 Mo. App. 596.

2. McGregor *v.* Chase, 37 Vt. 225.

into possession of the property he can not be held as a garnishee because of his possession of the property, for by foreclosure the mortgagor is divested of his title and since he could not recover, the attachment plaintiff can not,¹ even though an absolute deed is not yet given.²

Mortgagee in possession of insurance money.—It frequently happens that a policy of insurance is made payable to a mortgagee. If then a loss occurs and it is desired to secure whatever balance may remain in the hands of the mortgagee after his mortgage is satisfied, he may be held liable as a garnishee for the balance as in other cases, but where it is contingent it can not be reached;³ neither can it before the loss is proved according to the provisions of the policy, even though the mortgagee afterwards receive the full amount of the loss which sum exceeds his claim,⁴ unless this be in a state permitting the garnishment of funds payable in the future. The surplus of a loss on a policy paid to a resident agent of a non-resident mortgagee can not be secured by service of process upon the agent,⁵ although he be authorized to dispose of the surplus, if any, according to his own view of the responsibility of his principal.⁶ Where the mortgagor is not entitled to the surplus remaining in the hands of the mortgagee after his demand is satisfied, such surplus can not be reached by garnishment

1. *Ante*, §§ 475, 487.

2. *Whitcomb v. Simpson*, 39 Me. 21; *Dexter v. Field*, 32 Me. 174; *Osgood v. Sanborn*, 18 N. H. 44.

This, however, is easily distinguished from any surplus remaining unpaid upon the purchase price at the mortgaged sale if the same be payable to the mortgagor.

Garnishee's answer.—When a garnishee relies upon a foreclosure of the mortgage he must in his disclosure show what the conditions of the mortgage were, and must further state that the mortgage has been foreclosed. *Dexter v. Field*, 32 Me. 174. Further as to "Garnishee's Answer," see *post*, § 617.

3. *Ante*, § 481.

4. *Meacham v. M'Corbitt*, 2 Metc. (Mass.) 352.

5. *Cramer v. Flint*, 18 Pick. (Mass.) 140; *Atwood v. Hale*, 17 Mo. App. 81; *ante*, § 548.

6. *The policy is the property of him to whom it is issued.*—If one man procures a policy of insurance upon another man's goods, it can not be reached by process of garnishment served upon the company in a suit against the owner. The owner himself could not recover it. *Tim v. Franklin*, 87 Ga. 93, 13 S. E. Rep. 259; *Levi v. Franklin*, 87 Ga. 93, 13 S. E. Rep. 259.

in a suit against the mortgagor;¹ as where the mortgagor had assigned the surplus to another creditor after satisfying the mortgagee.²

Purchaser of mortgaged premises.—The purchaser of mortgaged premises can not be made a garnishee in a suit against the mortgagee. The fact that he has agreed with his vendor to pay the mortgage debt does not make him a debtor of the mortgagee where no demand is made by the mortgagee; nor anything paid since the debt was assumed; nor other thing done or agreed to be done creating a privity of contract between the vendee and mortgagee.³

§ 586. (c) *Only when possession taken.*—Following a primary rule of garnishment,⁴ a mortgagee of chattels can not, in the absence of fraud, be held liable as a garnishee in a suit against the mortgagor, even for surplus, unless he has taken actual possession of the property mortgaged, and then only for so much of the property as he has actually taken into his possession, even where the mortgage is to secure the performance of some other condition than the payment of money.⁵

1. *Ante*, §§ 475, 487.

2. *Henderson v. Alabama Gold Life Ins. Co.*, 72 Ala. 32.

3. *Hartman v. Olvera*, 54 Cal. 61; *Elmer v. Welch*, 47 Conn. 56.

4. *Ante*, § 476.

5. *Curtis v. Raymond*, 29 Iowa 52; *Fountain v. Smith*, 70 Iowa 282, 30 N. W. Rep. 635; *Letts-Fletcher Co. v. McMaster*, 83 Iowa 449, 49 N. W. Rep. 1035; *Pierce v. Henries*, 35 Me. 57; *Wood v. Estes*, 35 Me. 145; *Mace v. Heald*, 36 Me. 136; *Reggio v. Day*, 37 Me. 314; *Callender v. Furbish*, 46 Me. 226. To nearly the same effect, *Skowhegan Bank v. Farrar*, 46 Me. 293; *Central Bank v. Prentice*, 18 Pick. (Mass.) 396; *Badlam v. Tucker*, 1 Pick. (Mass.) 389, 400; *Haskell v. Gordon*, 3 Metc. (Mass.) 268; but see *Johnson v. Sumner*, 1 Metc. (Mass.) 172; *Lyon v. Ballentine*, 63

Mich. 97, 29 N. W. Rep. 837; *Aldrich v. Woodcock*, 10 N. H. 99.

The mere fact that one has securities for money in his hands belonging to the principal debtor is not ground for making him a garnishee. *Van Amee v. Jackson*, 35 Vt. 173.

If money be placed in the hands of one of two sureties as security for both, the one alone who has possession can be charged as a garnishee. *Chesley v. Coombs*, 58 N. H. 142. Further as to "Bailees," see *ante*, §§ 577, 578.

Mortgage construed by mortgagor and mortgagee.—Where a mortgage was broad enough in its terms to include certain shares of stock belonging to the mortgagor, the mortgagor being insolvent, it was sought to secure them by process of garnishment served upon the mortgagee. Both

Furthermore, if a mortgagee has been in possession of the mortgaged property and has parted with the possession and control of it, he can not be thereafter held liable in garnishment, and it is immaterial whether the mortgage is valid or invalid, or the mortgagee's possession lawful or unlawful as against the creditors instituting the proceedings,¹ he must be indebted or have personal property in his possession belonging to the principal defendant.²

§ 587. (d) **In case mortgage invalid.**—When a plaintiff's debtor has mortgaged his property to a third person, and the mortgage is invalid, a process of garnishment served upon such third person is the proper proceeding to test the validity of the mortgage, for in such a case a mortgagee in possession will simply be holding property which belongs to the principal defendant, and the garnishee's answer, or the issue raised thereon should be competent to disclose the facts. Furthermore, the rule that the plaintiff can recover from the garnishee no more than the defendant could have recovered does not apply where there was collusion and fraud between the mortgagor and mortgagee.³ The fact also that the garnishee is only the agent of the mortgagee will not defeat the garnishment where the mortgage was executed to defraud creditors, and the garnishee had knowledge of such fact when he took possession of such property.⁴

the mortgagor and the mortgagee testified that it was not intended to include the stock in the mortgage, and therefore it was held that the garnishee was not liable. *Younkin v. Collier*, (Cir. Ct.) 47 Fed. Rep. 571.

1. *Spitz v. Tripp*, 86 Wis. 25, 56 N. W. Rep. 330.

2. *Ante*, § 476.

3. *Healey v. Butler*, 66 Wis. 9; *Bennett v. Wolcott*, 19 Mo. 654; *Cummings v. Fearey*, 44 Mich. 39; *Hooton v. Gamage*, 11 Allen (Mass.) 354; *Brainard v. Van Kuran*, 22 Ia. 261; *Price v. Mazange*, 31 Ala. 701.

4. *Citizens' State Bank v. Council Bluffs Fuel Co.*, 89 Iowa 618, 57 N. W. Rep. 444.

Intervention may be attacked for fraud.

—Where an insurance company was made a garnishee, and a mortgagee interposed a claim supported by his mortgage, the plaintiff was permitted to attack the mortgage as made in fraud of the principal defendant's creditors. *North Star Boot and Shoe Co. v. Ladd*, 32 Minn. 381; *Coykendall v. Ladd*, 32 Minn. 529.

§ 588. **Fraudulent vendee in possession.**—It is a well-known principle of attachment, as hereinbefore shown,¹ that so long as the vendor of personal property has not lost his power to sell and deliver the same, it may be attached to satisfy his debt, and the converse of the proposition is equally well known: that is to say, when the vendor has lost his power over the property and can not change its destination, such property can not be attached at suit of a creditor of the vendor.² By an elementary principle of law, however, no title does pass to the vendee when a contract of sale is fraudulent, and consequently he does not hold possession of the property as of his own right, but since the sale was a nullity he holds property belonging to the vendor which can be reached by process of garnishment served upon him. Garnishment is an efficient remedy to test the validity of a sale of chattels alleged to be fraudulent when the vendee is in possession, but although he be given a fraudulent bill of sale, process of garnishment served upon him will be unavailing if he has not obtained or has lost the possession of the property.³

Land, in the absence of special statutes to that effect, is not generally considered to be susceptible of garnishment.⁴ Therefore a fraudulent vendee of real estate can not be held as a garnishee in a suit against the vendor, although the purpose has

1. *Ante*, Vol. I.

2. *Oliver v. Lake*, 3 La. Ann. 78; *ante*, §§ 35, 37 and 39.

3. *Claffin v. Landecker*, 17 Mo. App. 615; *Gutterson v. Morse*, 58 N. H. 529.

Acceptance of vendee necessary.—Although the sale be not fraudulent, goods which have been contracted for, but not delivered to the acceptance of the purchaser, will not make such purchaser amenable to process of garnishment in a suit against the vendor. *Lewis v. Ross*, 37 Me. 230.

When balance of purchase-money may be reached.—When chattels have been conveyed upon the consideration that the vendee should pay the purchase-price to and among the creditors of

the vendor, and the vendee has not covenanted or agreed to pay the price to them, no trust is created, and any unpaid balance may be reached by process of garnishment served upon him in a suit against the vendor. *Kelly v. Babcock*, 49 N. Y. 318.

Likewise where the vendee has been instructed to pay creditors, and the creditors have refused to accept payment from him, any balance of the purchase-price remaining in his hands may be reached by garnishment at suit of a creditor of the vendor. *Greene & Button Co. v. Marshall*, 72 Wis. 648, 39 N. W. Rep. 767, 40 N. W. Rep. 643.

4. *Ante*, § 468.

been to keep the property from the reach of creditors, especially where the vendor is still in possession.¹ The defrauded creditor is relegated to a court of equity.

§ 589. When directed against a judgment-debtor.—In considering whether or not a judgment may be reached by process of garnishment served upon the judgment-debtor, two lines of reasoning present themselves, each of which has some right and justice to sustain it. One course of reasoning considers that, inasmuch as one court has adjudged that the debtor should pay a certain sum to his creditor, therefore another court should not interfere with the workings of the legal machinery by a summary writ of garnishment.² This seems particularly pertinent where the judgment has been entered either in a state or a federal court and the writ of garnishment issues from the other; for in that event there is a direct conflict of legal process which the courts endeavor to avoid.³ However, where the writ issues from the same court, such objection loses much of its force, and garnishment has been permitted on principle, even though the plaintiff is entitled to an execution at the time of issuing the attachment writ.⁴

A different course of reasoning suggests that a judgment is a debt, liquidated, not depending upon any contingency, and since it is the policy of the law to subject a man's property,

1. *Chapman v. Williams*, 13 Gray (Mass.) 416; *Baxter v. Currier*, 13 Vt. 615; *Stevens v. Kirk*, 37 Vt. 204; *National Union Bank v. Brainerd*, 65 Vt. 291, 26 Atl. Rep. 723.

2. *Trowbridge v. Means*, 5 Ark. 135; *Tunstall v. Means*, 5 Ark. 700; *First National Bank v. Dunn*, 102 Ala. 204, 14 So. Rep. 559; *Goodman v. Boyd*, 44 Ill. App. 249; *Franklin v. Ward*, 3 Mason (U. S. C. C.) 136; *Prescott v. Parker*, 4 Mass. 170; *Norton v. Winter*, 1 Ore. 47; *Despain v. Crow*, 14 Ore. 404; *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330.

3. *American Bank v. Snow*, 9 R. I. 11; *Henry v. Gold Park Mining Co.*,

5 McCrary (U. S.) 70, s. c. 15 Fed. Rep. 649; *Thomas v. Wooldridge*, 2 Woods 667.

4. *Young v. Cooper*, 59 Ill. 121; *Keith v. Harris*, 9 Kan. 386.

In Michigan, a judgment recovered in one justice's court was not permitted to be garnished in proceedings before another justice. *Sievers v. Woodburn-Sarven Wheel Co.*, 43 Mich. 275. But in Illinois a judgment obtained in a circuit court was subjected to process of garnishment issued from a justice's court. *Luton v. Hoehn*, 72 Ill. 81. But the intentment of special statutes is taken into consideration.

rights and credits (except that which is specifically exempted) to the payment of his debts, that a judgment should be amenable to garnishment process served upon the judgment debtor in a suit against the judgment creditor. Following this, the stronger reason why a judgment should be amenable to a process of garnishment, the courts are inclined to construe statutes to imply that judgments are debts within the meaning of statutory provisions, while others explicitly provide that a debt due "upon any judgment or decree" is susceptible of attachment by garnishment.¹

However, an executed judgment in garnishment will be no defense to the execution of the other judgment,² unless the enforcement of such judgment has been enjoined.³ And no stay of proceedings is necessary, pending an appeal from an order dissolving the garnishment in order that the garnishee may be

1. *Gager v. Watson*, 11 Conn. 168; *Hanna v. Bry*, 5 La. Ann. 651; *McLaughlin v. Swann*, 18 How. (U. S.) 217; *Karp v. Citizens' National Bank*, 76 Mich. 679; *Detroit Post and Tribune Co. v. Reilly*, 46 Mich. 459; *Hagadon v. Campbell*, 24 Ala. 375; *Archer v. People's Sav. Bank*, 88 Ala. 249; *Cook v. Field*, 3 Ala. 53; *Howard Harrison Iron Co. v. Tillman*, — Ala. —, 15 So. Rep. 456; *Sharpe v. Wharton*, 85 Ala. 225, 3 So. Rep. 787; *Halbert v. Stinson*, 6 Blackf. (Ind.) 398; *Hodson v. McConnel*, 12 Ill. 170; *Phillips v. Germon*, 43 Iowa 101; *Allison v. C., B. & Q. R. R. Co.*, 76 Iowa 209, 40 N. W. Rep. 813; *Beaver Valley Bank v. Cousins*, 67 Iowa 310; *Berry v. Harris*, 22 Md. 30; *Fenten v. Block*, 10 Mo. App. 536; *Albrecht v. Treitschke*, 17 Neb. 205; *Sutton v. Hasey*, 58 Wis. 556; *St. Joseph Mfg. Co. v. Miller*, 69 Wis. 389, 34 N. W. Rep. 235.

Judgment in the name of one, but in fact belonging to another, can, of course, not be reached, although the attaching creditor be misled in believ-

ing it to be in favor of his creditor. *Allison v. C., B. & Q. R. R. Co.*, 76 Iowa 209, 40 N. W. Rep. 813.

Where a judgment is obtained in the name of one for the use of another it can not be garnished as the property of the other, for the one is the equitable owner. *Hodson v. McConnel*, 12 Ill. 170.

It is the *judgment* and not the *verdict* which creates an indebtedness susceptible of garnishment. A recovery for libel is not, until after judgment is entered on the verdict, such an indebtedness as may be reached by garnishment. *Detroit Post and Tribune Co. v. Reilly*, 46 Mich. 459.

Judgment record can not be directly seized.—The clerk of a court is the rightful custodian of a judgment record, and the same can not be seized by direct attachment. *Hanna v. Bry*, 5 La. Ann. 651.

2. *Sharpe v. Wharton*, 85 Ala. 225, 3 So. Rep. 787.

3. *Moore v. Holt*, 10 Gratt. (Va.) 284.

protected. If he pays the other judgment he will have no further liability.¹

Judgment debtor for wages exempt.—A debtor upon a judgment recovered for wages can not be held as a garnishee where wages are exempt from attachment, unless the principal debtor waives the exemption, and if judgment is wrongfully obtained in garnishment the debtor may have a right of action against the recovering creditor.²

§ 590. When suit pending between principal defendant and garnishee.—It sometimes happens that a suit is pending between a creditor and a debtor and also that another suit is pending between a third person as plaintiff and the plaintiff in the first suit as defendant, in which latter suit the defendant in the first suit is made a garnishee. The question then to be determined is whether or not the plaintiff in the second suit can sustain his garnishment and secure the demand against the garnishee which the plaintiff in the first suit (the principal defendant in the second suit) is seeking to recover. In the first place it may be said that when a suit is pending the subject-matter thereof is in the custody of the court and that another court, not of superior jurisdiction, can not obtain control thereof and therefore that the first suit instituted will be sustained and during the pendency of it the other suit will be unavailing.³

However, the fact that a suit is pending in another state will have no effect upon the garnishment proceeding in this state, the courts being disposed to protect the garnishee who stands before them without *laches* or default.⁴ The pendency

1. *Montgomery Gas Light Co. v Mer-*
rick, 61 Ala. 534.

2. *Albrecht v. Treitschke*, 17 Neb. 205.

3. *Mattingly v. Boyd*, 20 How.
(U. S.) 128; *Wallace v. McCon-*
nell, 13 Peters (U. S.) 136; *Noyes v.*
Foster, 48 Mich. 273; *Custer v. White*,
49 Mich. 262; *Withers v. Pemberton*,
3 Coldw. (Tenn.) 56; *Miller v. Tay-*
lor, 14 Tex. 538.

But where the other court has the
the control of the property the court
in which the garnishment is begun
may compel the garnishee (a receiver
in this case) to respond to the writ.
Kohn v. Ryan, 31 Fed. Rep. 636.

4. *Woodruff v. French*, 6 La. Ann.
62; *Robeson v. Carpenter*, 7 Martin
(La.) N. S. 30.

of a suit in another state is not of itself any reason to delay the cause in this state,¹ and is no defense to the action in this state; because if a judgment is obtained here against the garnishee the foreign courts should give full effect to it, although it can not be pleaded in abatement.²

If, however, a garnishment proceeding be begun, and a suit is then pending between the principal defendant and the garnishee on the same demand, that fact will not *per se* abate the garnishment proceeding, but the court having full jurisdiction of the subject-matter may retain the same after the termination of the first suit, if in favor of the plaintiff, until the determination of the proceeding in garnishment, when it may be applied to the satisfaction of the judgment in the latter, if the garnishment is sustained.³ The garnishee will nevertheless be permitted to plead the pendency of the former suit in order to prevent the recovery of two judgments against him.⁴

1. *Chatzel v. Bolton*, 3 McCord (S. C.) 33.

But where a garnishee showed that he had previously been made a garnishee on the same demand in another state, judgment rendered in this state was subject to the condition that no execution be taken out until the extent of his liability under the proceedings in the other state was ascertained. *Broadnax v. Thomason*, 1 La. Ann. 382. A debtor being held by garnishment for the whole amount of his debt, can not during the pendency of garnishment be called upon by his creditor. *Haselton v. Monroe*, 18 N. H. 598.

2. *Datz v. Chambers*, (Pa. Com. Pl.) 3 Pa. Dist. Rep. 353; *Boyd v. Royal Ins. Co.*, 111 N. Car. 372, 16 S. E. Rep. 389.

Where, in a garnishment proceeding, personal service was had upon the garnishee and service by publication upon the non-resident defendant according to law, the lien created by the garnishment is binding upon all

who subsequently endeavor to subject the same claim to the payment of their debts. *Boyd v. Royal Ins. Co.*, 111 N. Car. 372, 16 S. E. Rep. 389.

3. *Trotter v. Lehigh Zinc & Iron Co.*, 41 N. J. Eq. 229, s. c. 42 N. J. Eq. 456; *Smith v. Barker*, 10 Me. (1 Fairf.) 458; *Thorndike v. DeWolf*, 6 Pick. (Mass.) 120; *Howell v. Freeman*, 3 Mass. 121; *Minor v. Rogers Coal Co.*, 25 Mo. App. 78; *Gibbon v. Dougherty*, 10 Ohio St. 365; *Morton v. Webb*, 7 Vt. 123.

Where a garnishment was pending and other creditors obtained a judgment first, the plaintiff in garnishment has been permitted to enjoin the sale under the prior judgments. *Moore v. Holt*, 10 Gratt. (Va.) 284. And when, in the same court, the court will not order the funds paid over until the garnishment is determined. *Baldwin v. Hosmer*, 101 Mich. 119, 59 N. W. Rep. 432.

4. *Smith v. Barker*, 10 Me. (1 Fairf.) 458.

Where judgment was entered in the

Furthermore, it is a general rule that a court will not enter judgment against a garnishee unless such judgment will wholly exonerate him from any further liability to the principal defendant. Therefore, judgment will not be entered against the garnishee in a pending garnishment proceeding, unless such judgment could be, by the garnishee, thereafter pleaded in bar to a judgment in a suit pending in favor of the principal defendant.¹

first suit at one term of court and set aside at the next term because of error in entering it, and upon rehearing judgment was entered as before, the facts being set up in a supplemental petition in the garnishment proceedings, it was held that a payment by the garnishee after the first judgment was set aside, and before the second was entered, did not discharge him from the pending garnishment process. *Gibbon v. Dougherty*, 10 Ohio St. 365.

1. *Noble v. Merrill*, 48 Me. 140; *Clark v. Gallagher*, 3 N. Y. S. 312. Further as to "Judgment," see *post*, § 685, *et seq.*

After a garnishee has filed his answer admitting an indebtedness, the omission of the court to charge him upon giving judgment against the principal defendant does not prevent the garnishee from pleading the garnishment as a defense, in an action against him by the defendant. *Howe v. Tefft*, 15 R. I. 477, 8 Atl. Rep. 707.

CHAPTER XXVII.

THE PROCESS AND ITS OPERATION.

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| <p>§ 591. Preliminary steps to procure it.
 (a) The necessary affidavit.</p> <p>592. Same—Must comply with the statute.</p> <p>593. Same—Must state indebtedness over and above exemptions, etc.</p> <p>594. Same—Must state the nature of the contract.</p> <p>595. Same—Must aver residence of parties or domicile of corporation.</p> <p>596. Same—Must be sworn to by affiant.</p> <p>597. Same—Objections, how raised—Amendment.</p> <p>598. (b) The bond.</p> <p>599. The writ and the form thereof.
 (a) Generally.</p> <p>600. (b) Grounds on which to be issued.</p> <p>601. (c) Separate writ, when necessary.</p> | <p>§ 602. (d) Style and direction of the writ.</p> <p>603. (e) Body of the writ—Recitation.</p> <p>604. (f) The seal and attestation.</p> <p>605. Informalities of the writ, effect thereof.</p> <p>606. Service of the writ.
 (a) Generally.</p> <p>607. (b) Service upon the principal defendant.</p> <p>608. (c) Personal service upon garnishee necessary.</p> <p>609. (d) What constitutes personal service.</p> <p>610. (e) Appearance does not give jurisdiction.</p> <p>611. (f) Officer's return.</p> <p>612. (g) Custody of the property.</p> <p>613. Effect or operation of garnishment.</p> <p>614. Priorities of garnishment.</p> <p>615. Dissolution of writ by bond.</p> <p>616. Effect of death of garnishee.</p> |
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§ 591. Preliminary steps to procure it—(a) The necessary affidavit.—In a proceeding by garnishment the purpose of the affidavit is the same and the necessity is as great as in an attachment by direct seizure.¹ It is a statutory prerequisite to the moving of the court to assert its jurisdiction over the property and effects of the debtor. It is universally admitted that a court has jurisdiction to control such property or effects within the territory over which it has authority,² and that the

1. *Ante*, Vol. I, § 127.

2. *Ante*, Vol. I, § 6.

court may be moved to assert its jurisdiction to the appropriation of such property to the satisfaction of the plaintiff's demand against the defendant by process of garnishment, an affidavit is necessary to show the court that there is cause therefor, and that there is, or that the affiant believes there is, such property or effects within the jurisdiction as the court has power to appropriate. The general rules governing affidavits for all attachments have been laid down in the preceding volume, to which the reader is referred.¹ Some general rules relating particularly to affidavits for garnishment will be here given, but the local practitioner is still referred to his controlling statute for the particular rules governing the practice in his case. The scope of this work will not permit, nor is it deemed to be desirable to set forth local statutes having no general application.

§ 592. **Same—Must comply with the statute.**—An affidavit is an absolute necessity because a court only gets jurisdiction by issuing a process predicated upon the required affidavit, and that, too, upon the particular affidavit specified by the statute. The affidavit must be a verity. The mere recital in the writ that such affidavit has been filed is not sufficient.² The record must affirmatively show that the statutory affidavit required as the foundation of a proceeding in garnishment was filed.³ Where the affidavit (bond and writ) does not appear, and there is no proof of loss or that it ever existed, any judgment entered will be erroneous.⁴

One affidavit may be sufficient for writs of garnishment against a number of persons severally as well as jointly liable

1. *Ante*, § 127-152.

2. *Paine v. Mooreland*, 15 Ohio 435; *Smoot v. Hart*, 33 Ala. 69; *Gibbon v. Bryan*, 3 Ill. App. 298; *Fremont Cultivator Co. v. Fulton*, 103 Ind. 393; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394; *Hoffman v. Simon*, 52 Miss. 302; *Brauser v. New England Fire Ins.*

Co., 21 Wis. 506; *Everdell v. Sheboygan, etc., R. R. Co.*, 41 Wis. 395.

That no affidavit is necessary in states where the "petition" is sworn to, see *Seawell v. Lowery*, 16 Tex. 47.

3. *Wells v. American Express Co.*, 55 Wis. 23.

4. *Blankenship & Blake Co. v. Moore*, (Tex.) 16 S. W. Rep. 780.

to the principal defendants. It is only the subsequent proceedings that must be separate.¹

How far conclusive.—An affidavit to procure process of garnishment is only conclusive as to the facts disclosed in it, and if it be insufficient the garnishment will be void and will not be aided by the fact that judgment in the principal suit has been obtained against the defendant.²

§ 593. Same—Must state indebtedness—Over and above exemptions, etc.—It is a general rule that the affidavit shall state the amount of the principal defendant's indebtedness to the plaintiff, and when so required such averment is jurisdictional, and an affidavit without it is insufficient and the proceeding void.³

Where the statute specifically makes effects garnishable which "are not exempt" from execution, etc., an affidavit that fails to state that the effects sought to be reached are *not exempt* is fatally defective.⁴

§ 594. Same—Must state the nature of the contract.—The

1. *Ball v. Young*, 52 Mich. 476, 18 N. W. Rep. 225; *State Savings Bank v. Hosmer*, 95 Mich. 100, 54 N. W. Rep. 632. See as to separate answer and judgment docket, *post*, § 617.

2. *Greene v. Tripp*, 11 R. I. 424.

If affidavit state that a suit has been begun by the plaintiff against the principal defendant, it will be presumed that the same is still pending, so as to comply with a statute providing for the issue of process of garnishment in pending suits. *State Savings Bank v. Hosmer*, 95 Mich. 100, 54 N. W. Rep. 632.

3. *Harris v. Clapp*, Minor (Ala.) 328; *Jones v. St. Onge*, 67 Wis. 520, 30 N. W. Rep. 927; *Stickley v. Little*, 29 Ill. 315.

An affidavit for garnishment which alleges that the garnishee "is indebted to said defendant, or has in his hands

effects of said defendant," is not fatal as being in the alternative. *White v. Lynch*, 26 Tex. 195; *Russell v. Ralph*, 53 Wis. 328. As to "Alternative Averment, Generally," in "Affidavit for Attachment," see *ante*, § 146.

The affidavit will not be defective, because it avers that another person than the garnishee is indebted to the defendant. *Curtis v. Henrietta Nat. Bank*, 78 Tex. 260, 14 S. W. Rep. 614.

And an affidavit averring that the garnishee "is indebted to the said defendants," in a suit against two defendants, is sufficient to charge the garnishee on a debt due to one only. *Aultman, Miller & Co. v. Markley*, (Minn.) 63 N. W. Rep. 1078.

4. *Pioneer Co-operative Co. v. Eagle and Phenix Mfg. Co.*, 67 Ga. 38; *Steen v. Norton*, 45 Wis. 412; *Rasmussen v. McCabe*, 46 Wis. 600.

affidavit is generally required to show the nature of the contract, whether express or implied, which binds the party sought to be charged, and when so required the affidavit will be fatally defective which fails to so state,¹ or if it fails to distinctly connect the garnishee's indebtedness sworn to with the suit or contract.²

It is the general but not the universal requirement that the affidavit name the person against whom the process of garnishment is desired.³

§ 595. Same—Must aver residence of parties or domicile of corporation.—Non-residence of the parties is frequently the ground on which an attachment is sought by process of garnishment, and in such cases the averment of the non-residence of the defendant is necessary;⁴ and again, the residence of the parties may be necessary to give the court jurisdiction of the subject-matter.⁵ When an averment of residence or non-residence is required, the omission of such averment will be fatal to the proceeding.⁶

Where it is sought to charge a corporation as a garnishee, the affidavit must so state, and must show that the corporation sought to be charged is amenable to the garnishment laws of the state; that is, whether it is domestic or foreign; whether located in this state or in another state in this country; or where it does business, or has its legal existence—otherwise the court will not get jurisdiction to issue the process.⁷

1. *Conway v. Ionia* Circuit Judge, 46 Mich. 28.

2. *Wemeister v. Manville*, 44 Mich. 408.

Where indebtedness joint.—If it be intended to direct the writ against a single individual, an allegation of his joint indebtedness with another to the defendant is demurrable. *Frizzell v. Willard*, 37 Ark. 478.

3. That summons of garnishment need not, in Georgia, name the garnishee. See *Owsley v. Woolhopper*, 14 Ga. 124. Further, that the writ need

not always recite the name of the garnishee. See *post*, § 603.

It is not necessary that the affidavit should state that the garnishee is a corporation. *Howland v. Jeuel*, 55 Minn. 102, 56 N. W. Rep. 581.

4. *Ante*, § 148.

5. *Ante*, §§ 489 and 490.

6. What is a sufficient averment of residence in Texas, see *Moton v. Hull*, 77 Tex. 80, 13 S. W. Rep. 849.

7. *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 331, 31 N. W. Rep. 201.

An affidavit was held to be *prima*

§ 596. **Same—Must be sworn to by affiant.**—The affidavit must be sworn to by the actual affiant,¹ but not of necessity before the clerk of the court from which the writ is to issue. It may be sworn to before any one legally authorized to administer oaths.² However, the affidavit need not state the character of the affiant. The use of the words agent or attorney by the way of recital or description is sufficient.³

§ 597. **Same—Objections, how raised—Amendment.**—The insufficiencies of the affidavit must be taken advantage of by plea in abatement (or motion to quash) and are waived by answer.⁴ The answer waives the objection which might be raised by the garnishee to irregularities,⁵ but the appearance of the garnishee can not give the court jurisdiction. Where an affidavit is jurisdictionally defective, and although the garnishee may have appeared and filed his disclosure, it is within the dis-

facie sufficient to show that the garnishee was a corporation when it named the garnishee as "The New England Fire Ins. Co. of Hartford, Conn." *Brauser v. New England, etc., Ins. Co.*, 21 Wis. 506.

Must aver indebtedness of corporation.—Where the affidavit does not state the indebtedness to be that of the corporation, but avers it to be the indebtedness of the agent thereof, a process of garnishment issued thereon will be quashed. *Bowers v. Continental Ins. Co.*, 65 Tex. 51.

1. *Weimeister v. Manville*, 44 Mich. 408.

2. *Horat v. Jackel*, 59 Ill. 139.

3. *Whetherwax v. Paine*, 2 Mich. 555.

An affidavit on information and belief as to the possession of property by the garnishee is generally sufficient. For example, that the deponent verily believes that the party named has property, credits or effects in his hands belonging to the defendant or that he is indebted to him.

Beck v. Cole, 16 Wis. 95; *Vinall v. De Pass*, L. R. (1892) App. Cases 90.

It may be required by statute that when a garnishment is sought to be issued on a judgment-debt, the affidavit, therefor, shall be made by the real owner of the judgment and not by the plaintiff of record. *Jackson v. Shipman*, 28 Ala. 488.

An affidavit by one member of a firm, which is plaintiff, will not be defective because of stating that "plaintiffs are apprehensive of loss," etc. It will be presumed that he has personal knowledge of such apprehensions. *Williams v. International G. & S. B.*, 99 Mich. 80, 57 N. W. Rep. 1089. *Everts v. International G. & S. B.*, 99 Mich. 80, 57 N. W. Rep. 1089.

4. *Foster v. Hall*, 4 Humph. (Tenn.) 346.

5. *Aultman, Miller & Co. v. Markley*, — Minn. —, 63 N. W. Rep. 1078; *Wile v. Kohn*, 63 Fed. Rep. 759; *Walter A. Wood, etc., Mach. Co. v. Edwards*, — Tex. Civ. App. —, 29 So. W. Rep. 418.

cretion of the court to dismiss the garnishment proceeding upon the garnishee's motion before judgment is entered in the principal case, and especially where the garnishee's conduct has not caused prejudice.¹

An affidavit may be amended for certain insufficiencies where a plea in abatement is filed or a motion is made to dismiss the proceeding, because thereof.² But if it is amended as to averments necessary to confer jurisdiction, the garnishee will not be held liable unless a new process is thereafter issued.³

§ 598. (b) **The bond.**—When a writ of garnishment is issued as an original process of attachment, a bond is generally required for the reasons hereinbefore set forth,⁴ and will be generally governed by the rules stated.⁵ But when the garnishment is only a process in aid of an execution, *i. e.*, issued upon a judgment upon which an execution has been returned unsatisfied, a bond is not generally required.

When a bond is required in order that the defendant, and possibly the garnishee, may be secured against any damage that may result from delay or otherwise, such bond is a necessary preliminary step to be made in order to give the court jurisdiction to appropriate the credit or property sought to be secured.⁶

1. *Conway v. Ionia Circuit Judge*, 46 Mich. 28.

2. *Ante*, § 152; *Conway v. Ionia Circuit Judge*, 46 Mich. 28.

3. *Pope v. Hibernia Ins. Co.*, 24 Ohio St. 481.

4. *Ante*, Vol. I, § 153.

5. Since garnishment is a double proceeding and may affect two different parties, two bonds (for costs) may be required; one for the principal debtor and one for the garnishee. *Griswold v. Bell*, 2 Aik. (Vt.) 355; *Corey v. Gale*, 13 Vt. 639.

6. *Kellogg v. Miller*, 6 Ark. 468; *Burton v. Wynne*, 55 Ga. 615; *Anderson v. Sutton*, 20 Duv. (Ky.) 480;

Schooler v. Alstrom, 38 La. Ann. 907; *Rothermel v. Marr*, 98 Pa. St. 285; *Heimsoth v. Le Suer*, — Tex. Civ. App. —, 26 S. W. Rep. 522.

Where the required bond is made by a person not having authority and is not ratified by the plaintiff until after the writ has issued, such writ may be abated, but a ratification of the bond before the issuance of the writ will be sufficient. *Kellogg v. Miller*, 6 Ark. 468.

In Alabama, the bond does not protect the garnishee. *Hays v. Anderson*, 57 Ala. 374; *Rounds v. Hammer*, 57 Ala. 342. But in Missouri he is indemnified against all costs, including

§ 599. **The writ and the form thereof—**(a) **Generally.**—The purpose and necessity for the writ of garnishment is the same as for an attachment by direct seizure,¹ though the effect is not entirely the same, as will be shown hereinafter.² The writ is procured by filing the jurisdictional affidavit,³ and bond, if required,⁴ and when these preliminary papers are filed, the writs must be issued in the order in which the papers are presented and the writs demanded; but if the party who makes the demand is not in attendance to receive the writ as soon as it is ready, the clerk is not bound to delay the issuance of other writs against the same party which have been demanded in the meantime.⁵

A writ of garnishment may issue against several persons, if the writ, allegations and interrogatories show a joint indebtedness or joint possession of goods.⁶

§ 600. (b) **Grounds on which to be issued.**—The grounds on which a writ of garnishment can be issued is generally confined by the statute to two. (1) That the person to be served has in his possession property or effects belonging to the

attorneys' fees. *State v. Immer*, 52 Mo. App. 536.

The obligors in a garnishment bond are not liable for the costs of the original suit nor for expenses incurred for its defense. *Heimsoth v. Le Suer*, — Tex. Civ. App. —, 26 S. W. Rep. 522; *ante*, §§ 182–190.

Bond to protect officer.—The only method by which an officer can be protected is by requiring a bond of indemnity from the plaintiff. *Heimsoth v. Le Suer*, — Tex. Civ. App. —, 26 S. W. Rep. 522; *ante*, §§ 40 and 203.

1. *Ante*, §§ 191–199.

2. *Post*, §§ 613.

3. *Ante*, § 591.

4. *Ante*, § 598.

5. *Lick v. Madden*, 25 Cal. 202.

Even though the fees are not paid or tendered in advance, unless the

clerk refuses to proceed without them. *Lick v. Madden*, 25 Cal. 202.

That no allowance by a judicial officer is necessary, see *Hinkley v. St. Anthony Falls, etc., Co.*, 9 Minn. 55; *ante*, §§ 194, 195.

The necessity for re-issue of writ in original attachment.—In a state where a garnishment proceeding is by service of the original writ of attachment, an attachment writ issued in a foreign county can not be so served, but there must be an issue of such an attachment writ in the county in which the garnishment is instituted and is to be personally served upon the garnishee. *Fuller v. Langford*, 31 Ill. 248.

6. *Moreland v. Pelham*, 7 Ark. 338.

One affidavit is sufficient. *Ball v. Young*, 52 Mich. 476; *State Sav. Bank v. Hosmer*, 95 Mich. 100, 54 N. W. Rep. 632.

defendant, and (2) that he is indebted to the principal defendant. These grounds are separate and distinct and the garnishee is never subject to be charged upon one when the process is confined to the other, except when the facts are such as to bring him within both.¹

§ 601. (c) **Separate writ, when necessary.**—A separate writ of garnishment is not always necessary, and whether it is necessary or not depends upon whether the plaintiff is seeking an *attachment by garnishment*, or whether he is seeking *garnishment in attachment*. If the former, then a writ of garnishment is the only attachment writ, and as there can be no attachment without a writ, a writ of garnishment must be issued; but if he is seeking garnishment in attachment then the attachment writ being already issued, no further writ of garnishment is necessary—a service of the attachment writ upon the garnishee being generally sufficient.² These are the two methods followed in the different states and sometimes both in one state.³

1. *Botsford v. Simmons*, 32 Mich. 352; *Weimeister v. Singer*, 44 Mich. 406; *Wiggins v. Anderson*, 1 Tex. 73; *ante*, §§ 475, 476.

2. No separate process is required, but the officer is required to summon him and to note in the return the manner in which the summons was served. *Weil v. Kittay*, 40 Ark. 528; *Ezelle v. Simpson*, 42 Miss. 515; *Claffin v. Iowa City*, 12 Iowa 284.

In such a case if the attachment is void on its face, the garnishment thereafter is necessarily void. *Matthews v. Sands*, 29 Ala. 136.

After judgment.—After judgment in attachment no further garnishment can issue on that attachment. *Ahrens, etc., Co. v. Patton, S. D. & B. Co.*, 94 Ga. 247, 21 S. E. Rep. 523.

3. Where the second writ (garnishment) is based upon the first writ

(attachment) it is jurisdictional that the attachment writ has issued, and therefore it is necessary to aver such fact before the application for the writ of garnishment. When this is required by statute and omitted, it can not be secured by subsequent amendment. *Scurlock v. Gulf, C. & S. F. Ry. Co.*, 77 Tex. 478, 14 S. W. Rep. 148.

Alias writs.—When the writ of garnishment depends upon the prior writ of attachment and the application is made to the clerk of the court for a writ of garnishment, he should also issue a writ of attachment, but his omission so to do, though a defect, will, it seems, not render the proceeding void. *C. C. Kelly Banking Co. v. Hollingsworth*, — Miss. —, 13 So. Rep. 932. See, also, *Axtell v. Gibbs*, 52 Mich. 639.

§ 602. (d) **Style and direction of the writ.**—The writ of garnishment, like other writs, should run in the name of the state, but when this is omitted, the omission is not a jurisdictional defect, and if the garnishee appears and answers without objection he will be deemed to have waived the defect; the principal defendant can not make any objection.¹

The writ should be directed to the proper sheriff or his deputy (and in a proceeding before a justice of the peace, to the sheriff or any constable, etc.), but an omission of such proper direction is not fatal, if the writ be served by the proper officer.²

§ 603. (e) **Body of the writ—Recitation.**—When a form of writ is prescribed by the statute it should be followed,³ but, though the statute provides that “the following form may be used” and sets forth a form, the statute is not mandatory and another may be used.⁴

The name of the garnishee need not be stated in an original attachment writ when issued, if such attachment writ is to be served as a summons upon the garnishee.⁵ But when the garnishment process itself is the only attachment sought, then no attachment can be made unless the garnishee’s name is in the writ at the time of service.⁶ This is the general rule, but the statute may be arbitrary, and when its directions are specific they must be followed.⁷

1. *Hinkley v. St. Anthony Falls, etc., Co.*, 9 Minn. 55.

2. *Brown v. Dudley*, 33 N. H. 511.

3. *Ante*, § 196.

4. *Curtis v. Henrietta Nat. Bank*, 78 Tex. 260, 14 S. W. Rep. 614; *Sawyer v. Howard*, 22 Vt. 538.

Regarding objections to the form of the writ, see *post*, § 597.

5. *Lindell v. Benton*, 6 Mo. 361; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Judge v. Reinhart*, (Pa. Com. Pl.) 3 Pa. Dist. R. 202; *McCambridge & Co. v. Barry*, (Pa. Com. Pl.) 29 W. N. C. 92; *Layman v. Beam*, 6 Whart. (Pa.) 181.

The name of the garnishee may be added after the writ has been tested and issued. *McCambridge & Co. v. Barry*, (Pa. Com. Pl.) 29 W. N. C. 92; *Badlam v. Tucker*, 1 Pick. (Mass.) 389. And it has been held that a service of the writ upon the garnishee without the garnishee being named therein was valid where the officer made a specific return of legal service upon him. *Judge v. Reinhart*, (Pa. Com. Pl.) 3 Pa. Dist. R. 202; *Lindell v. Benton*, 6 Mo. 361.

6. *Pratt v. Sanborn*, 63 N. H. 115; *Hirsh v. Thurber*, 54 Md. 210.

7. In a garnishment process directed

The principal defendant must be named in the writ in order to identify the credit or effect sought to be reached, otherwise the garnishee is not bound to retain the fund.¹ Names are used for identification, and when the garnishee is not misled a misnomer will not affect the validity of the proceeding.² But where the person intended to be named is not identified, the proceeding will be void. For example, where the middle initial of the person named as defendant is different from that of the person to whom the garnishee is indebted, the process will not bind the garnishee unless he be shown to have actual knowledge that his debtor and the person named are one and the same.³

Any number of persons may generally be joined in a writ of garnishment, whether they be liable or indebted to the defendant jointly or severally, and such a union of names in the writ does not make it subject to a plea in abatement.⁴

The amount sworn to be due from the principal defendant to

against a copartnership firm the individual names of the members of the firm should be recited, for their omission will be fatal. *Hirsh v. Thurber*, 54 Md. 210.

Where the writ directs the officer to summon a person named as agent of a corporation, which corporation is sought to be charged as garnishee, and the writ does not direct the corporation itself to be summoned, it will not be sufficient to support a judgment in garnishment against the corporation. *Varnell v. Speer*, 55 Ga. 132; *Insurance Co. v. Friedman*, 74 Tex. 56, 11 S. W. Rep. 1046.

A writ of garnishment, against a foreign corporation, which alleges that the corporation has an authorized agent residing within the state, will generally be found to be sufficient to give the court jurisdiction, if a legal service be made. *Chaffee v. Rutland R. R. Co.*, 55 Vt. 110.

1. *German Nat. Bank v. National*

State Bank, (Colo. App.) 39 Pac. Rep. 71.

2. *Bentley v. Kaufman*, 12 Phila. (Pa.) 435; *Clanton v. Laird*, 12 S. & M. (20 Miss.) 568; *Bowler v. European, etc., Ry. Co.*, 67 Me. 395; *Bushnell v. Allen*, 48 Wis. 460.

A misnomer of the baptismal name of a member of a firm is not material if the title of the firm be correctly stated. *Rushton v. Rowe*, 64 Pa. St. 63.

3. *German Nat. Bank v. National State Bank*, (Colo. App.) 39 Pac. Rep. 122; *Terry v. Sisson*, 125 Mass. 560.

4. *Curry v. Woodward*, 50 Ala. 258.

Furthermore, if the garnishee's answer shows that he is indebted to the named defendant, and another in common, the writ may be amended by joining the other as a defendant, provided no rights of third parties have intervened. *Sullivan v. Langley*, 128 Mass. 235.

the plaintiff is generally required to be inserted in or indorsed on the writ.¹ But no other rule in this regard can be stated than that if it is specifically required, its omission will be ground for quashing the writ.

The rules relating to the return day of writs of attachment have been stated at length.² And these govern the conduct of the officer in that regard. Likewise it is not always necessary to state, in the summons to the garnishee, any particular date at or before which he must appear and answer.³ But the general requirement of the statutes is that he must appear at or by a certain day, as "the first day of the next term," and when so specified the statute is peremptory and must be obeyed and a notice to appear at any other time will not give the court jurisdiction.⁴

The writ must be made returnable to the proper county in order that jurisdiction may be therein acquired over the garnishee (the county where the garnishee or one of the garnishees resides).⁵

§ 604. (f) **The seal and attestation.**—When garnishment is a new suit, a summons therein to the garnishee is a process requiring a seal of the court and *teste* of the proper officer designated by the statute.⁶ But where the suit is an attachment

1. *Weaver v. Russell*, 18 Ohio 497.

2. *Ante*, § 196.

3. *Hearn v. Adamson*, 64 Ga. 608.

4. *Padden v. Moore*, 58 Iowa 703; *Acme Lumber Co. v. Francis Vandergrift Shoe Co.*, 70 Miss. 91, 11 So. Rep. 657; *McDonald v. Vinette*, 58 Wis. 619; *Houston v. Porter*, 10 Ired. (N. Car.) L. 174.

If the writ state both the day of the week and the day of the month and they do not correspond, it will not of necessity be defective. The day of the month will control. *State Sav. Bank v. Hosmer*, 95 Mich. 100, 54 N. W. Rep. 632.

And a mere clerical error as to the day of the month is waived by ap-

pearance and answer on the day intended. *Wellover v. Soule*, 30 Mich. 481. Further as to clerical error, see *post*, § 605.

5. *Hooper v. Jellison*, 22 Pick. (Mass.) 250.

A subsequent insertion of the name of the trustee residing within the county in which the writ is made returnable, although made before service on the principal defendant, will not cure the defect in a previous service on a trustee living out of that county. *Hooper v. Jellison*, 22 Pick. (Mass.) 250.

6. *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. Rep. 252; *ante*, § 196.

by direct seizure and the garnishee is simply to be "notified" by the officer so required by some statutes, such notification being a simple notice, though sometimes in writing, no seal and attestation is required as in a writ.

§ 605. **Informalities of the writ—Effect thereof.**—Informalities in a writ of garnishment (its service or return) which do not go to the jurisdiction, will be, by the garnishee, waived if he appears and answers.¹ The principal defendant can make no objection because thereof.² But a garnishee, by his appearance, can not give a court jurisdiction when the errors in the writ, service or return, are fatal thereto.³

Defects in the writ should be raised by motion to quash or plea in abatement. Demurring to a writ is not a proper practice.⁴

§ 606. **Service of the writ—(a) Generally.**—Garnishment is a proceeding *quasi in rem*, and two services are necessary to confer jurisdiction: (1) Service of summons to bring the garnishee into court, and (2) service upon the defendant as in ordinary cases. Any insufficiency in this regard is fatal,⁵ for

1. *Phelps v. Reeder*, 39 Ill. 172;
Wellover v. Soule, 30 Mich. 481;
Flournoy v. Rutledge, 73 Ga. 735;
National Bank of Commerce v. Titsworth, 73 Ill. 591.

2. *Sturtevant v. Robinson*, 18 Pick. (Mass.) 175.

3. See *post*, § 606.

Erroneous garnishment does not affect judgment in principal suit.—The fact that the court may not have jurisdiction to enter judgment in the attachment suit by garnishment, because of defects therein, will not of itself deprive the court of jurisdiction to enter judgment against the principal defendant properly before it, and the property may thereafter be seized on execution. *Cleland v. Tavernier*, 11 Minn. 194.

4. *Curry v. Woodward*, 50 Ala. 258.

Regarding a motion to dissolve generally, see, *ante*, §§ 326, *et seq.*

Regarding the amendment of the writ, generally, see *ante*, § 197.

The precept of the writ commanding the officer to attach property found in the hands of two garnishees may be amended to show joint possession, as by inserting the words "jointly," or "as copartners." *Fulleton v. Hayes*, 32 N. H. 212.

Lost writ and other papers.—A court of equity has jurisdiction to preserve the lien where lost papers can not be supplied. *Alley v. Carrol*, 6 Heisk. (Tenn.) 221.

5. *Swallow v. Duncan*, 18 Mo. App. 622; *Epstein v. Salorgne*, 6 Mo. App. 352; *Alexander v. Lloyd*, 70 Miss. 662, 14 So. Rep. 22; *Central Trust Co. of*

no subsequent proceeding by *scire facias* (or otherwise) can take the place of proper service of process of garnishment.¹

Service must be made in the exact method prescribed by statute, or the effects or credits of the debtor in the hands of the garnishee can not be appropriated to the satisfaction of the plaintiff's demand.² It is by the service of the writ and not by its delivery to the officer that the court gets control of the property.³

§ 607. (b) **Service upon the principal defendant.**—All attachments are, in a sense, at least, considered to be ancillary to another suit against the plaintiff's debtor.⁴ Attachment by garnishment is no exception to the rule. No judgment can be entered against the garnishee unless there has been some kind of service upon the principal debtor by which he is notified of the proceeding against him and has been given a day in court to defend himself or his property. And further, if the statute provides that process of garnishment may issue in another suit, then the other suit must be pending; that is to say, the process in the principal suit must, at least, be issued (when that is considered to be the commencement of a suit), or such process must have been served (if that is necessary to the commencement of the suit).⁵ Where, however, a garnishment process is issued upon a judgment, *i. e.*, in aid of an execu-

N. Y. *v. Chattanooga, etc., Ry. Co.*, 68 Fed. Rep. 685; *Nashville Bank v. Ragsdale, Peck (Tenn.)* 296.

1. *Illinois Cent. R. Co. v. Brooks*, 90 Tenn. 171, 16 S. W. Rep. 77.

2. *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Purves v. Lex, (Pa.)* 9 Atl. Rep. 167; *Mohr v. Warg*, 26 Pa. St. 106; *Cohn v. Tillman*, 66 Tex. 98; *Morse v. Nash*, 30 Vt. 76; *Younkin v. Collier, (Cir. Ct.)* 47 Fed. Rep. 571.

When garnishee can not be served.—That one named as a garnishee can not be served with process when he is a suitor or witness engaged upon the trial of the case, see *Thornton v. American W. M. Co.*, 83 Ga. 288. For

the same as to attorneys, electors *et al.*, see controlling statute.

3. *Bergman v. Sells*, 39 Ark. 97; *Johnson v. Carry*, 2 Cal. 33; *Tweedy v. Bogart*, 56 Conn. 419, 15 Atl. Rep. 374.

4. *Ante*, Vol. I, § 3.

5. *Carleton v. Wash. Ins. Co.*, 35 N. H. 162; *Donald v. Nelson*, 95 Ala. 111, 10 So. Rep. 317; *Blossom v. Estes*, 84 N. Y. 614; *Martin v. Central Vermont R. Co.*, 3 N. Y. S. 82, 50 Hun (N. Y.) 347; *McCloskey v. Judge of Wayne Circuit*, 26 Mich. 100; *Hamilton v. Rogers*, 67 Mich. 135, 34 N. W. Rep. 278; *Axtell v. Gibbs*, 52 Mich. 640; *Hoagland v. Wilcox*, 42 Neb. 138, 60 N. W. Rep.

tion, it is not generally necessary that notice of the garnishment be given to the judgment-debtor.¹

When a further notice is required to be given to the principal defendant than the ordinary service of summons in the commencement of the suit, such notice is for the further purpose of informing him of the garnishment of his rights or credits, and on principle must specify and describe the debt or property of the defendant, which it is sought to appropriate by the garnishment.² And when such service can not be made upon the principal defendant personally, because of his non-residence, there is generally a provision of statute whereby constructive notice may be given to him by publication in the manner prescribed.³

376; *Wise v. Rothschild*, 67 Iowa 84; *Williams v. Williams*, 61 Iowa 612; *Simpson v. Knight*, 12 Fla. 144; *De St. Romes v. Levee Steam Cotton Press*, 21 La. Ann. 291.

No service upon the principal defendant was required before service of garnishment where he had fraudulently deposited the property with the bailee. *Greenleaf v. Mumford*, 19 Abb. (N. Y.) Pr. 469.

A Connecticut statute makes the service upon the garnishee notice to a non-resident defendant, and no copy of the writ describing the property need be served on the agent of the non-resident as in cases of direct attachment. *Fuller v. Foote*, 56 Conn. 341, 15 Atl. Rep. 760.

1. *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 36 N. W. Rep. 139; *Thompson v. Taylor*, 13 Me. 420; *Smith v. Dickson*, 58 Iowa 444.

Especially where such judgment-debtor is in prison. *Thompson v. Taylor*, 13 Me. 420.

In Nebraska the statute does not require a notice in such cases, but a court may require it before the garnishee files his answer in order that the debtor may have an opportunity

to plead exemption. *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 36 N. W. Rep. 139. The rule would seem to be different in states where the garnishee is required to claim the exemption for the principal defendant.

2. *O'Brien v. Mechanics'*, etc., *Fire Ins. Co.*, 35 N. Y. Super. Ct. 70; *Hayden v. National Bank of the State of New York*, 130 N. Y. 146, 29 N. E. Rep. 143; *Orear v. Clough*, 52 Mo. 55; *Singer v. Townsend*, 53 Wis. 126, 226.

Garnishment has been sustained where no notice to the defendant was given in cases where he had personal knowledge of the garnishment. *Winner v. Hoyt*, 68 Wis. 278, 32 N. W. Rep. 128; *Emil Kiewert Co. v. Hoyt*, 68 Wis. 296, 32 N. W. Rep. 137; *Corning v. Hoyt*, 68 Wis. 294, 32 N. W. Rep. 138. And certainly with reason and justice, where he avoided the service of process; and, further, he was denied the right to put in issue, by plea, the grounds averred in the affidavit on which the garnishment issued. *Garnier v. Johnson*, 22 Ala. 494. Compare *Wilson v. Koontz*, 7 Cranch (U. S.) 202.

3. *Broome v. Galena*, etc., *Packet*, 9 Minn. 239; *Dorr's Admr. v. Rohr*, 82

It must be borne in mind, however, that where the court has acquired no jurisdiction over effects or credits of the principal defendant in the possession of the garnishee by the service of process of garnishment, or where there are no such effects or credits, then no valid judgment can be entered against the principal defendant by force of the publication. Service upon a defendant by publication will not give a court jurisdiction to enter a personal judgment.¹

§ 608. (c) **Personal service upon garnishee necessary.**—In all attachments it is necessary that the court have possession of the property to be applied. In attachment by seizure the court must have actual possession of the property by the hand of the officer making the levy.² And in garnishment the court must have constructive possession by the officer having made an actual personal service of the writ of garnishment upon the garnishee—or what is generally considered the same—by leaving a copy at his usual place of residence.³

Va. 359; *Searing v. Benton*, 41 Kan. 758, 21 Pac. Rep. 800; *King v. Vance*, 46 Ind. 246; *Newman v. Manning*, 89 Ind. 422.

1. *Carleton v. Washington Ins. Co.*, 35 N. H. 162; *Morris v. Union P. Ry. Co.*, 56 Iowa 135.

2. *Ante*, § 200.

3. *Mathews v. Smith*, 13 Neb. 178; *Clark v. Chapman*, 45 Ga. 486; *Lyon v. Russell*, 72 Me. 519; *Johnson v. Johnson*, 26 Ind. 441; *Almy v. Wolcott*, 13 Mass. 73; *Cooper v. Ingraham*, 45 Miss. 198; *Dyson v. Baker*, 54 Miss. 24; *Bank of the State of Missouri v. Bredow*, 31 Mo. 523; *Parker v. Scott*, 64 N. Car. 118; *Ex parte Alston*, 2 Brev. (S. Car.) 87; *Illinois Cent. R. Co. v. Brooks*, 90 Tenn. 161, 16 S. W. Rep. 77; *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. Rep. 863; *Cushing v. Laird*, 4 Ben. (D. C.) 70; *Barlow v. Hunt*, 10 Vt. 129; *Schindler v. Smith*, 18 La. Ann. 476.

The fact that the garnishee has actual knowledge of the issuance of a

writ of garnishment against him will not dispense with the necessity of service upon him. *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. Rep. 863. Further as to waiver, see *post*, § 610.

Judgment nisi.—Under a Mississippi statute, where there is no personal service on the garnishee, there can be no final judgment against him, but judgment *nisi* must be entered against him with *scire facias*, returnable to the next term, unless the court believe that the garnishee can be personally served at once, in which case it may be made returnable instant. *Alexander v. Equitable Fire Ins. Co.*, — Miss. —, 12 So. Rep. 706.

When garnishment suit begun.—In Michigan a garnishment suit is not considered to be begun until there is service of the writ of garnishment. *Milwaukee Bridge and Iron Works v. Wayne Co. Cir. Judge*, 73 Mich. 155, 41 N. W. Rep. 215.

When a copartnership is made a garnishee it is generally necessary that all the individual members composing the firm be personally served with garnishment process.¹ When, however, some of the members of a copartnership are absent from the state, service of process of garnishment upon the resident members will, generally, be sufficient to bind the firm.²

Personal service upon a fictitious person—a corporation, foreign or domestic, other than municipal—is obtained under statutory provisions generally by *personal* service upon the president or presiding officer, director or manager, cashier, secretary or treasurer, and sometimes “or other officer,” and sometimes upon any “general or special agent,” or clerk.³

1. *Warnerv. Perkins*, 8 Cush. (Mass.) 518; *Jewett v. Bacon*, 6 Mass. 60; *Parker v. Danforth*, 16 Mass. 299.

Service upon member of a copartnership is, however, good as against a third person claiming the property. *Shelters v. Boudreau*, — N. H. —, 32 Atl. Rep. 151.

2. *Parker v. Danforth*, 16 Mass. 299; *Atkins v. Prescott*, 10 N. H. 120.

When one of two partners is served it does not secure the property of the firm, but may become valid and effective when, by amendment, the other partner is joined. *Peabody v. Maguire*, 79 Me. 572, 12 Atl. Rep. 630.

If two persons engage in a voyage jointly, each sharing the profits and losses, and each contributing time and services, they are partners, and freight earned by them can not be secured by process of garnishment unless the service is had upon both. *Bulfinch v. Winchenbach*, 3 Allen (Mass.) 161.

A process of garnishment, served upon a resident partner while another is absent from the state, will not appropriate notes belonging to the defendant, which are at the time in possession of the absent partner and subsequently surrendered by him to the defendant before return to the

state, although he was informed by his partner of the service of process. *Bowen v. Pope*, 28 Ill. 125, 17 N. E. Rep. 64.

Where two are served with process of garnishment and their answer discloses the fact that one is merely the agent of the other, a judgment against both is erroneous and will be reversed on appeal. *Meeker v. Sanders*, 6 Iowa 61. Regarding bringing suit of garnishment against a firm in Iowa by its firm name, see *Mason v. Rice*, 66 Iowa 174, 23 N. W. Rep. 384; *Brumwell v. Stebbins*, 83 Iowa 425, 42 N. W. Rep. 1020.

Joint makers of a note.—Service of process of garnishment upon one of two or more joint and several makers of a note is, however, a sufficient notice to all. *Ayott v. Smith*, 40 Vt. 532.

3. *Kennedy v. Hibernia L. & S. Society*, 38 Cal. 151; *Adams v. Willimantic Linen Co.*, 46 Conn. 320; *Clark v. Chapman*, 45 Ga. 486; *Steiner v. Central R. R. Co.*, 60 Ga. 552; *Lyon v. Russell*, 72 Me. 519; *Boyd v. Chesapeake, etc., Co.*, 17 Md. 195; *Northern C. R. Co. v. Rider*, 45 Md. 24; *Detroit, etc., R. R. Co. v. Younghans*, 2 Mich. (N. P.) 143; *Lake Shore & M.*

The statutory provision is special and local, and must be strictly followed by special reference thereto, it being impossible to give particular directions here. As a general rule, however, service will be sufficient when had upon the most authoritative officer or agent amenable thereto. And when by the policy of the law notice is given to an officer or agent, officially, for the purpose of being communicated to the corporation, or to a director officially for the purpose of being communicated to the board, the corporation or board is bound thereby, although such notice of garnishment be not communicated to the company or board.¹ On principal it is generally required that the corporation have property within the state or be doing business within the

S. R. Co. v. Hunt, 39 Mich. 469; *Milwaukee Bridge and Iron Works v. Brevoort*, 73 Mich. 155, 41 N. W. Rep. 215; *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. Rep. 900; *First Nat. Bank v. Burch*, 80 Mich. 242, 45 N. W. Rep. 93; *Mathews v. Smith*, 13 Neb. 178; *Moulin v. Trenton Ins. Co.*, 24 N. J. L. 222; *Bates v. New Orleans, etc., R. R. Co.*, 4 Abb. (N. Y.) Pr. 72; *National Bank v. Lake Shore, etc., R. R. Co.*, 21 Ohio St. 221; *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. Rep. 863; *Tompkins Machine and Implement Co. v. Schmidt*, (Tex.) 16 S. W. Rep. 174; *Dittenhoefer v. Cœur D'Alene Clothing Co.*, 4 Wash. St. 519, 30 Pac. Rep. 660; *Davidson v. Donavon, etc., Co.*, 4 Cranch Cir. Ct. (U. S.) 578.

1. *Boyd v. Chesapeake, etc., Co.*, 17 Md. 195.

In Tennessee service of garnishment upon a depot agent in a county other than that in which the company has a chief office or business is not sufficient where no reason is assigned for failing to serve it upon the president, secretary, treasurer, or a director. *Lambreth v. Clarke*, 10 Heisk. (Tenn.) 32.

Service upon a bookkeeper is not

sufficient under a statute which provides that the process of garnishment may be served upon the "presiding officer, cashier, secretary or treasurer, or any other officer or agent of such corporation." *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. Rep. 900. But where the president and cashier of a bank were absent, service upon the bookkeeper during business hours was held to be sufficient. *First Nat. Bank v. Turner*, (Neb.) 46 N. W. Rep. 290.

A clerk has been held to be a proper person on whom to serve the process. *Davidson, etc., Co. v. Donovan*, 4 Cranch. Cir. Ct. (U. S.) 578. But in the absence of the president of a *domestic corporation*, under a statute requiring service upon the president, a service upon a subordinate officer or agent is not sufficient in Georgia because the process of garnishment acts immediately, and it is said that it would be grossly unfair to hold the company to take immediate notice and act at its peril on a notice to a mere agent at a remote point from its principal place of business. *Clark v. Chapman*, 45 Ga. 486; *Steiner v. Central R. R. Co.*, 60 Ga. 552.

state.¹ But some special statutes have provided for service of process of garnishment upon an officer of a foreign corporation temporarily within the territorial jurisdiction of the court,² "whether he is on business of the corporation or not."³ Statutes permitting service of garnishment upon the agent of a corporation generally require that it be served upon a resident agent, or the agent then and there having charge of the office or business of the corporation.⁴ In such cases if the corporation does no business in the state, it is not liable in garnishment.⁵

§ 609. (d) **What constitutes personal service.**—Personal service of a writ of garnishment is made in the same manner that personal service of other writs are made. It is not only by reading to the garnishee in person and delivering to him a copy, but it may be by leaving the same at his residence with some member of his family.⁶

Writs of garnishment are served upon corporations in the same manner as other writs are served upon corporations.⁷ It is usual for the statute to prescribe that a copy (or "certified

1. *Bates v. New Orleans, etc., R. R. Co.*, 4 Abb. (N. Y.) Pr. 72; *Moulin v. Trenton Ins. Co.*, 24 N. J. L. 222; *ante*, § 492-497.

2. *Reynolds v. Lochiel Iron and Steel Works*, (Pa. Com. Pl.) 11 Pa. Co. Ct. R. 33; *First Nat. Bank v. Burch*, 80 Mich. 242, 45 N. W. Rep. 93.

3. *First Nat. Bank v. Burch*, 80 Mich. 242, 45 N. W. Rep. 93.

But the statute providing for the service upon any officer, member, clerk or agent within the state applies only to garnishment proceedings in which the original suit is instituted by attachment. *Kirby Carpenter Co. v. Trombley*, 101 Mich. 447, 59 N. W. Rep. 809.

4. *Hargis v. East Tennessee, V. & G. Ry. Co.*, 90 Ga. 42, 15 S. E. Rep. 631; *Mahany v. Kephart*, 15 W. Va. 609; *Mineral Point Ry. Co. v. Keep*, 22 Ill.

9; *Midland P. R. R. Co. v. McDermid*, 91 Ill. 170.

5. *Midland P. R. R. Co. v. McDermid*, 91 Ill. 170.

Service upon a railway corporation is, in Missouri, required to be upon "the nearest station or freight agent." *Haley v. Hannibal & St. L. R. Co.*, 80 Mo. 112; *Mangold v. Dooley*, 89 Mo. 111, 1 S. W. Rep. 126; *Werries v. Missouri P. R. Co.*, 19 Mo. App. 398; *Masterson v. Missouri P. R. Co.*, 20 Mo. App. 653.

Service upon a foreign insurance company having a commission within the state may be made by service upon such commissioner. *Moshassuck Felt-Mill Co. v. Blanding*, 17 R. I. 297, 21 Atl. Rep. 538. Compare *First Nat. Bank v. Burch*, 80 Mich. 242.

6. *Ante*, § 608.

7. *Harris v. Somerset & Ken. R. R. Co.*, 47 Me. 298.

copy'') of the writ of attachment—and often also a copy of the order of attachment—and a notice to appear at a certain time and answer the commands of the writ. Whatever acts are prescribed by the statute must necessarily be performed, in order that the court may acquire jurisdiction, for if an essential act is omitted the garnishment will fail.¹ Under some statutes the officer must give, also, notice to the garnishee of the property in his possession or what debt due by him he has attached.²

In cases where equities of redemption are sought to be secured by process of garnishment served upon the mortgagee in possession, the statutes frequently require that the officer who serves the writ upon the garnishee shall also demand of him a certificate of account showing the extent of the property in his possession belonging to the principal defendant; but before he can make such a demand he must show to the garnishee that he has authority to make it, *i. e.*, he must disclose to the garnishee the fact that he has such execution or attachment, and is thereby subrogated to the principal defendant's right to redeem. Whatever the statute prescribes must be strictly followed.³

Fees of garnishee to be paid in advance.—The garnishee being a disinterested party in the termination of the suit, and it being somewhat of a hardship for him that he be compelled to

1. *Johnson v. Gorham*, 6 Cal. 195; *Stamford Bank v. Ferris*, 17 Conn. 259; *Rathbone v. Rile*, 3 Day (Conn.) 503; *Flagg v. Platt*, 32 Conn. 216; *Claffin v. Iowa City*, 12 Iowa 284; *Foster v. Haddock*, 6 N. H. 217; *Clark v. Wilson*, 15 N. H. 150; *Redington v. Dunn*, 24 N. H. (4 Fost.) 162; *Wright v. Douglass*, 3 Barb. (N. Y.) 554; *In re Flandrow*, 84 N. Y. 1; *In re Flandrow*, 20 Hun (N. Y.) 36; *Martin v. Central Vermont R. Co.*, 50 Hun (N. Y.) 347, 3 N. Y. S. 82; *Warner v. Fourth Nat. Bank*, 115 N. Y. 251, 22 N. E. Rep. 172; *Conley v. Chilcote*, 25 Ohio St. 320; *Penn. R. R. Co. v. Pennock*, 51 Pa. St. 244; *Huntington v. Bishop*, 3 Vt. 515; *Ca-*
- hoon v. Morgan*, 38 Vt. 234; *Kneeland v. Cowles*, 4 Chand. (Wis.) 46.
2. *Roberts v. Landecker*, 9 Cal. 262; *Dore v. Dougherty*, 72 Cal. 232, 13 Pac. Rep. 621; *First Nat. Bank of Leadville v. Leppel*, 9 Colo. 594, 13 Pac. Rep. 776. *Contra*, *Bell v. Wood*, 87 Ky. 56, 7 S. W. Rep. 550.
3. *Ricker v. Blanchard*, 45 N. H. 39; *Schieb v. Baldwin*, 13 Abb. (N. Y.) Pr. 469, 22 How. (N. Y.) Pr. 278; *Warner v. Fourth Nat. Bank*, 115 N. Y. 251, 22 N. E. Rep. 172; *Batchellor v. Richardson*, 17 Ore. 334, 21 Pac. Rep. 392; *Mitchell v. Shelton*, 35 Conn. 1.

come into court and make his disclosure, it is quite a usual provision of the statute that he be paid certain prescribed fees and mileage at the time service is made upon him, and when such is the provision of statute, and such fees are not tendered to him, he is not compelled to appear and answer, but he is nevertheless under obligation to retain in his possession all of the property of the principal defendant which he has under his control and to withhold the payment of any sum of money which he may owe to him.¹

§ 610. (e) **Appearance does not give jurisdiction.**—It is a well recognized principle of the law of garnishment that the garnishee must stand indifferent to both the plaintiff and the defendant and that he can do nothing to aid either party in the suit.² Upon this principle a garnishee can not voluntarily waive or accept service of the proceedings required by law to make a seizure of effects or property in his hands. And if the garnishee is not legally served nothing has been attached by the process of garnishment when the attachment proceeding is void. It is essential in order to bind the creditor (the principal defendant) whose claim is sought to be appropriated by process of garnishment that there should be service thereof, and such principal defendant will not be bound by an independent and spontaneous admission of his rights by his debtor—the garnishee. Garnishment is a compulsory novation which the law can alone initiate by the intervention of its own substantial appointments. The court does not obtain jurisdiction over the debt sought to be seized without sufficient

1. *Westphal v. Clark*, 42 Iowa 371; *Stockberger v. Lindsey*, 65 Iowa 471. Compare *Kauffman v. Jacobs*, 49 Iowa 432.

The garnishee may, if he choose, waive his rights to his fees. *Hinkley v. St. Anthony Falls, etc., Co.*, 9 Minn. 55.

Where, however, the garnishee has appeared without having demanded mileage, he can not demand it as a condition precedent to his answering. *Stockberger v. Lindsey*, 65 Iowa 471.

In Illinois, such a fee and mileage is necessary to make it obligatory upon the part of the garnishee to come into a *justice's court* and make answer concerning his indebtedness or liability to the principal defendant. Rev. St. Ch. 62, ¶ 4, § 4.

In Minnesota, the prepayment of the fees is not necessary to compel the garnishee to appear and make answer. *Goodrich v. Hopkins*, 10 Minn. 162.

2. *Ante*, § 471-474.

service upon the garnishee, for acceptance of service by the garnishee is not an attachment. The garnishee by appearing and answering can not waive objections to the jurisdiction. Jurisdictional defects can be taken advantage of even in a collateral proceeding.¹

Appearance by the principal defendant is a pleading to the merits of the principal action and will also be unavailing toward giving the court jurisdiction over the attachment which is absolutely void.²

Irregularities and insufficiencies alone can be waived.—The voluntary appearance and answer of the garnishee will, however, waive all clerical errors or other irregularities in the writ and return and all mere insufficiencies in the manner in which he is brought into court.³ The appearance of the defendant and his entering upon the trial will likewise waive all objections to prior irregularities.⁴

1. *Schindler v. Smith*, 18 La. Ann. 476; *Phelps v. Boughton*, 27 La. Ann. 592; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400; *Blake v. Hubbard*, 45 Mich. 1; *Gates v. Tusten*, 89 Mo. 13; *Masterson v. Missouri Pacific Ry. Co.*, 20 Mo. App. 653; *Epstein v. Salorgne*, 6 Mo. App. 352; *State v. Duncan*, 37 Neb. 631, 56 N. W. Rep. 214; *Nelson v. Sanborn*, 64 N. H. 310, 9 Atl. Rep. 721; *Insurance Co. v. Friedman*, 56 Tex. 74, 11 S. W. Rep. 1046; *Edler v. Hasche*, 67 Wis. 653.

But a service which is not absolutely void can not be attacked collaterally. *Axman v. Dueker*, 45 Kan. 745, 26 Pac. Rep. 946.

The sheriff's return also must show the service.—If it fails to show that he made, to the garnishee, the declaration which the statute requires in order that the property or debt in the garnishee's hands may be bound, no judgment can be entered against the garnishee. His answer admitting that he has funds of the principal defendant will not help the case. *Connor v. Pope*, 18 Mo. App. 86.

Contra.—In Indiana and Oregon it seems the garnishee may, by appearance, waive the personal service required by the statute, *Whitney v. Lehmer*, 26 Ind. 503; *Carter v. Koshland*, 12 Oregon 492; and that in Vermont the acceptance of service by the garnishee, is sufficient to bind the funds in his hands as against a subsequent assignee. *Cahoon v. Morgan*, 38 Vt. 234.

The writ and return the only evidence of garnishment.—Although the garnishee has appeared and answered, he may deny the garnishment, and the only evidence of it will then be the writ and return thereon. *McDonald v. Moore*, 65 Iowa 171.

2. *Woodfolk v. Whitworth*, 5 Coldw. (Tenn.) 561.

3. *Wellover v. Soule*, 30 Mich. 481; *Lupton v. Moore*, 101 Pa. St. 318; *Woodfolk v. Whitworth*, 5 Coldw. (Tenn.) 561.

4. *Crane v. Hardy*, 1 Mich. 56; *ante*, § 221.

§ 611. (f) **Officer's return.**—There must be a strict compliance with the provisions of the statute relating to the officer's return regarding the manner in which he served the writ upon the garnishee, for the proper return of the writ is an element in the acquirement of jurisdiction by the court.¹ Therefore, where the officer is commanded to attach the property, or evidence of debt, in the garnishee's hands, a return that he summoned the garnishee to answer touching his indebtedness to the defendant is insufficient to give the court jurisdiction. The return must show that the officer has attached the property or evidence of debt "in his hands" or the court will not get jurisdiction of the *res*.²

No judgment can be rendered against the garnishee by default unless the return shows what property in the garnishee's hands belonging to the defendant was levied upon.³

1. Where there is no sufficient return, the garnishee will be discharged. *Rock v. Singmaster*, 62 Iowa 511; *Bryan v. Trout*, 90 Pa. St. 492; *Jaffray's Appeal*, 101 Pa. St. 583; *Semmes v. Patterson*, 65 Miss. 6, 3 So. Rep. 35; *Gates v. Tusten*, 89 Mo. 13, 14 S. W. Rep. 827; *Truitt v. Griffin*, 61 Ill. 26.

2. *Norvell v. Porter*, 62 Mo. 309; *Brecht v. Corby*, 7 Mo. App. 300; *Todd v. Missouri Pac. Ry. Co.*, 33 Mo. App. 110.

A full answer by the garnishee will not aid such an insufficient return. The garnishment may be quashed on motion; but pending such a motion the officer may amend his return according to the facts. *Todd v. Missouri Pac. Ry. Co.*, 33 Mo. App. 110; *Norvell v. Porter*, 62 Mo. 309; *Haley v. Hannibal & St. J. R. Co.*, 80 Mo. 112; *Mangold v. Dooley*, 89 Mo. 111; *Farmer v. Medcap*, 19 Mo. App. 250.

3. *Maulsby v. Farr*, 3 Mo. 438; *Ridgway v. Farr*, 3 Mo. 440.

In *Arkansas* the statute requires that with the sheriff's return he make

a schedule of all the visible tangible property attached, but not of the credits or indebtedness of the garnishee to the attachment defendant. The latter may be secured, though no tangible property of the defendant be found in the garnishee's hands. *Read v. Kirkwood*, 19 Ark. 332. Further as to the declaration that he has made an attachment, see *Desha v. Baker*, 3 Ark. 509.

In *Louisiana* an officer's return is not considered to include any property in garnishment except what is disclosed by the garnishee's answer. *Page v. Generes*, 6 La. Ann. 549.

In *Mississippi* the attachment will be sustained if a debtor of the defendant is summoned without any actual levy on any property and the return of the sheriff need not show how the same was executed, for it will be sufficient if he make a general return that he has "executed" the writ and give the name of the garnishee and the garnishee appears and answers. *Roy v. Heard*, 38 Miss. 544; *Bryan v.*

When the statute designates the character of the officer or agent on whom process of garnishment may be served, it is then necessary that the officer's return shall show affirmatively upon what person the writ was served, in order that the court may be able to determine whether proper service was made.¹

When the officer's return of the service upon the garnishee shows upon its face that it is insufficient and there is reason for setting the same aside, the application therefor should be made before or at the time of filing the garnishee's answer; for, as to mere irregularities and insufficiencies, objections will be waived by appearing and answering.²

An amendment will be allowed to be made to the officer's return for the furtherance of justice when, through accident or inattention, his return does not correspond with the facts. And it may be so amended after answer.³

§ 612. (g) **Custody of the property.**—In attachment by seizure it is absolutely necessary that the officer take possession of the property,⁴ but in attachment by seizure the object is to create a lien upon the property which can not be done without an actual seizure thereof.⁵ Now in garnishment the officer serv-

Lashley, 21 Miss. (13 Sm. & M.) 284; Benson v. Holloway, 59 Miss. 358.

In *Alabama*, under a statute requiring that the garnishee shall be summoned in writing, it is not necessary that the officer show in his return that he summoned the garnishee "in writing" for such will be the intentment of his return, it being sufficient in other respects. Lowry v. Clements, 9 Ala. 422; Burt v. Parish, 9 Ala. 211.

1. Northern Central R. Co. v. Rider, 45 Md. 24.

Service upon an attorney of a corporation is not service upon one of its "officers" within the meaning of the statute. Northern Central R. Co. v. Rider, 45 Md. 24.

A return by the officer that he has served the process of garnishment

upon the agent of the garnishee is conclusive evidence that the service was made upon the agent. Woodworth v. Ranzehousen, 7 Cush. (Mass.) 430.

2. Kohler v. Thorn, 154 Pa. St. 180, 26 Atl. Rep. 255; Wellover v. Soule, 30 Mich. 481; ante, § 610.

3. O'Connor v. Wilson, 57 Ill. 226; Smith v. Clinton Bridge Co., 13 Ill. App. 572; O'Connell v. Ackerman, 62 Md. 337; Wellover v. Soule, 30 Mich. 481.

A mere clerical error in the return day is waived by appearance and may thereafter be amended, or the mistake therein may be disregarded. Wellover v. Soule, 30 Mich. 481.

4. Ante, §§ 200 and 243.

5. Ante, § 314.

ing the process is not authorized to take possession of the debtor's effects found in the hands of the garnishee, nor is he authorized to take security for their forthcoming. This is because the purpose of garnishment is not to create a lien upon the property or effects, but to charge the garnishee with the value of the same and to warn him not to pay it to the principal debtor. The service of process does not even operate as an injunction to prevent the garnishee from converting the property to his own use or from disposing of it. In any event he can only be charged for its value.¹ Garnishment is a pretended attachment of personal property, and its manifest intention is to appropriate property (rather the proceeds of property) which from its very nature is not susceptible of manual seizure, and the writ effects its purpose without the officer serving it taking the attached (?) property into his possession. The garnishee, when served, becomes the custodian of the property (or its value) for the puposes of the garnishment.²

As a matter of fact the property itself is not generally considered to be in custody of the law on process of garnishment, for the plaintiff himself may cause the goods in the hands of the garnishee to be subsequently attached,³ and the goods in the hands of the garnishee may be attached by another officer by direct seizure on a writ of direct attachment.⁴ But as against

1. *Ante*, §§ 467, 515, and *post*, § 613.

And he will be charged for its value when judgment is entered against him, even though he may have delivered the property to the defendant himself in the meantime. *First Nat. Bank v. Turner*, 30 Neb. 80, 46 N. W. Rep. 290.

2. *Moore v. Holt*, 10 Gratt. (Va.) 284; *Berry v. State*, Dudley (S. C.) 215; *Rockwood v. Varnum*, 17 Pick. (Mass.) 289; *Renneker v. Davis*, 10 Rich. (S. C.) Eq. 289; *Commercial Travelers' Asso. v. Newkirk*, — Sup. —, 16 N. Y. Supp. 177; *Naser v. First Nat. Bank*, 116 N. Y. 492, 22 N. E. Rep.

1077; *Kelly v. Lane*, 42 Barb. (N. Y.) 594; *Walcott v. Keith*, 2 Foster (N. H.) 196; *Dennistoun v. New York Co.*, 6 La. Ann. 782; *Dwight v. Mason*, 12 La. Ann. 846; *Minthorn v. Hemphill*, 73 Iowa 257, 34 N. W. Rep. 844; *Edwards v. Baldwin*, 2 Root (Conn.) 23; *Greenish v. Standard Sugar Refinery*, 2 Low. 553; *Henry v. Gold Park Mining Co.*, 3 McCrary Cir. Ct. 390; *Brashear v. West*, 7 Pet. (U. S.) 607.

3. *Clapp v. Rogers*, 38 N. H. 435.

Such attachment will, however, discharge the garnishee *pro tanto*. *Clapp v. Rogers*, 38 N. H. 435.

4. *Burlingame v. Bell*, 16 Mass. 318.

the garnishee such attachment can not take precedence over the garnishment.¹

It is only when there is manifest danger of damage accruing to the rights of the plaintiff that the possession of the property can be taken from the garnishee, and it is then by a special statutory proceeding in the case; generally by having a receiver appointed to take charge of the property.² In a proper case a garnishee who is shown to be embarrassed and about to leave the state, or who is causing danger in other ways, may be required to pay the moneys in controversy into court.³ And if a garnishee abandons property belonging to the debtor, after service of process of garnishment has been made upon him, the court may appoint a suitable person to take charge of the property, and, if necessary, to sell it and take charge of the proceeds.⁴

§ 613. **Effect, or operation of garnishment.**—The process of garnishment served upon the garnishee does not have the effect of attaching the property or credits in the hands of the garnishee⁵ that a direct attachment has upon the property of the defendant taken by direct seizure.⁶ The effect of the garnishment is to make the garnishee the trustee of the money of the defendant.⁷ The service of the garnishment process operates as an inchoate assignment to the plaintiff of the demand which the defendant had against the garnishee, and after judgment any payment which the latter may make in due course of law will protect him from any demand which the principal debtor may thereafter make against him. It places the attaching creditor in the same relation to the garnishee as that occupied by the debtor before the attachment was laid,⁸ securing

1. *Focke v. Blum*, 82 Tex. 436, 17 S. W. Rep. 770; *post*, § 613; *ante*, §§ 401–425.

2. *Zorn v. Wheatley*, 61 Ga. 437; *Hall v. Brooks*, 89 N. Y. 33; *Wheeler v. Emerson*, 45 N. H. 526.

3. *Johann v. Rufener*, 32 Wis. 195.

4. *Northfield Knife Co. v. Sharp-leigh*, 24 Neb. 635, 39 N. W. Rep. 788.

5. *Epstein v. Salorgne*, 6 Mo. App. 352; *Mosher v. Barthorow*, 6 Mo. App. 598.

6. *Ante*, Vol. I, §§ 313–325.

7. *Perkins v. Guy*, 2 Mont. T. 15.

8. *Buschman v. Hanna*, 72 Md. 1, 13 Atl. Rep. 962; *Campbell v. Nesbitt*, 7 Neb. 300; *Good v. Grant*, 76 Pa. St. 52; *Coble v. Nonemaker*, 78 Pa. St.

to him all chattels, moneys, evidences of debt, or any interest which the debtor has in them.¹ It can place him in no better position except in case of fraud, in which case the garnishment plaintiff may be in a better position than the principal debtor was, because the principal debtor may be estopped from taking advantage of his own wrong. And further the title may have passed as to him and the plaintiff be in position to attack the transfer for fraud by garnishment.²

During the pendency of the garnishment the garnishee is the custodian of the fund indifferent to either party,³ and can pay it to neither except when the principal defendant gives bond for the dissolution of the attachment,⁴ in which case he may pay the fund to the defendant.⁵ After judgment the garnishee is obliged to pay the person to whom the law, by its process, has transferred the debt.⁶ After service of garnishment, the principal defendant, though absent from the state, can not transfer the chose in action, which he has against the garnishee, to any other person so as to defeat the garnishment.⁷

However, the rights of the principal defendant remain only

501; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354; *Reed v. Penrose*, 2 Grant (Pa.) Cas. 472; *Judge v. Reinhart*, (Pa. Com. Pl.) 3 Pa. Dist. R. 202.

1. *Patterson v. Indiana*, 2 Greene (Iowa) 492; *Woodworth v. Lemmerman*, 9 La. Ann. 524.

A debt not evidenced in writing is attached by making the debtor a garnishee. *Woodworth v. Lemmerman*, 9 La. Ann. 524.

2. *Ante*, § 546; *Coble v. Nonemaker*, 78 Pa. St. 501; *Samuel v. Agnew*, 80 Ill. 553; *Henry v. Wilson*, 85 Iowa 60, 51 N. W. Rep. 1157; *McKenzie v. Wilson*, 85 Iowa 60, 51 N. W. Rep. 1157.

Where there is no debt from the garnishee to the principal defendant, there can be no lien created by garnishment. *Hamilton v. Rogers*, 67 Mich. 135, 34 N. W. Rep. 278, except in cases where the former has property

in his possession belonging to the latter. *Ante*, § 476.

3. *Ante*, §§ 471-474.

4. *Ante*, §§ 302-312; *post*, § 615.

5. *Balkum v. Strauss*, (Ala.) 14 So. Rep. 53.

6. *Tubb v. Madding*, Minor 100 Ala. 129, 207; *Ryan v. Burkham*, 42 Ind. 507; *Kenosha Stove Co. v. Shedd*, 82 Iowa 540, 48 N. W. Rep. 933; *Bridge v. Shedd*, 82 Iowa 540, 48 N. W. Rep. 933; *Burdett v. Shedd*, 48 N. W. Rep. 933; *Clark v. Powell*, 17 La. Ann. 177; *Jackson's Appeal*, 2 Grant (Pa.) 407; *Parker v. Farr*, 2 Browne (Pa.) 331; *Gause v. Cone*, 73 Tex. 239, 11 S. W. Rep. 162.

7. *Coit v. Bull*, Kirby (Conn.) 149; *Rockwood v. Varnum*, 17 Pick. (Mass.) 239; *Walcott v. Keith*, 2 Foster (N. H.) 196; *Williamson v. Bowie*, 6 Munf. (Va.) 176; *ante*, §§ 434-446.

in abeyance, and unimpaired during the pendency of the garnishment, but in subordination to the process, and if the garnishment proceeding fails, the principal defendant is in the same position in relation to his debtor as he was before the proceeding began.¹

Garnishment does not create a lien upon effects or credits in the same sense that attachment by direct seizure creates a lien upon property, and yet it does create a lien on the proceeds or fund to the extent that the garnishee can not pay it, nor can the principal defendant secure it; and this lien, such as it is, takes effect from the time of service, and thereafter where so specially provided.² Garnishment creates an inchoate lien which can only be perfected by judgment.³ The garnishee is not a judgment debtor of the plaintiff until judgment is actually rendered against him.⁴

The object of garnishment is to reach property, credits and effects not exempt from attachment and garnishment, but which could not be reached on process of attachment by direct seizure, and to apply the same to the satisfaction of the plaintiff's demand against the principal defendant in cases in which attachment would fail were it not for the provisions made for the service of process of garnishment.⁵ Garnishment is a species of attachment by notice,⁶ and is efficient in

1. *Hicks v. Gleason*, 20 Vt. 139; *Maish v. Bird*, (Cir. Ct.) 48 Fed. Rep. Mensing *v.* Engelke, 67 Tex. 532. 607.

2. *Warfield v. Campbell*, 38 Ala. 527; *Martin v. Foreman*, 18 Ark. 249; *Gow v. Marshall*, 90 Cal. 565, 27 Pac. Rep. 422; *Fitch v. Waite*, 5 Conn. 117; *Daniels v. Meinhard*, 53 Ga. 359; *Bigelow v. Andress*, 31 Ill. 322; *Johnson v. Brant*, 38 Kan. 754, 17 Pac. Rep. 794; *Gillette v. Cooper*, 48 Kan. 632, 30 Pac. Rep. 13; *Steuart v. West*, 1 Harr. & J. (Md.) 536; *Northfield Knife Co. v. Sharpleigh*, 24 Neb. 665, 39 N. W. Rep. 788; *Renneker v. Davis*, 10 Rich. S. C. (Eq.) 289; *Ringold v. Suiter*, 35 W. Va. 186, 13 S. E. Rep. 46;

3. *Rhodes v. Amsinck*, 38 Md. 345; *Langdon v. Thompson*, 25 Minn. 509. 4. *Parker v. Parker*, 2 Hill Ch'y (S. C.) 35.

A verdict in his favor is not sufficient.

5. *Storm v. Cotzhausen*, 38 Wis. 139; *Chanute v. Martin*, 25 Ill. 63.

Garnishment secures nothing where the possession of the property has passed from the garnishee. *Henry v. Bew*, 43 La. Ann. 476, 9 So. Rep. 101.

6. *Beamer v. Winter*, 41 Kan. 596, 21 Pac. Rep. 1078.

case where the other form of attachment would have no greater effect than the levy of an execution.¹

The rights and credits which are reached by a process of garnishment are so reached by it operating as a proceeding *in rem*, and nothing further is reached by it, unless the defendant is also personally served with process of summons, or personally appears. When he is so served or appears, then the action, as to him, becomes a personal action, and a personal judgment may be entered against him, regardless of whether the process of garnishment and service thereof is sufficient to sustain a judgment in garnishment against the garnishee or not.²

§ 614. **Priorities of garnishment.**—Garnishment being a species of attachment, the rules applied in determining priorities of attachment in general, which have been hereinbefore laid down,³ apply as well generally in determining priorities between garnishments, or between a garnishment and other processes or deeds. It is a primary rule that the processes will take precedence in the order in which they are levied. The first service of garnishment creates the first lien. The maxim, *quie prior est tempora potior est jure*, applies to garnishment.⁴

Simultaneous garnishments cause each attaching creditor to acquire a lien on one undivided moiety of the funds secured, provided the moiety is no more than sufficient to satisfy the debt, but if the demand be more than sufficient to satisfy the

1. *Shorten v. Drake*, 38 Ohio St. 76; *Secor v. Witter*, 39 Ohio St. 218.

2. *Green v. Hill*, 4 Tex. 465; *Lovejoy v. Albee*, 33 Me. 414; *Boyd v. Royal Ins. Co.*, 111 N. C. 372, 16 S. E. Rep. 389.

3. *Ante*, Vol. I, §§ 401–425.

4. *Talbot v. Harding*, 10 Mo. 350; *Arthur v. Batte*, 42 Tex. 159; *Beers v. Place*, 36 Conn. 578; *McCobb v. Tyler*, 2 Cranch Cir. Ct. (U. S.) 199.

Even though the officer have earlier writs in his hands at the time. *Mc-*

Cobb v. Tyler, 2 Cranch Cir. Ct. (U. S.) 199. *Contra*, *Callahan v. Hollowell*, 2 Bay (S. C.) 8. As to officer's duty in serving writs, see *ante*, §§ 202 and 205.

Garnishment is prior to former execution in the hands of the same officer where he has taken no statutory steps to reach the debt—*First Nat. Bank v. Reinitz*, 4 N. Y. S. 801—under a statute where the mere issuance of the execution does not create a lien.

debt of either, he will be limited in his recovery accordingly; and if the demand of the other be sufficiently large to cover the surplus, he will have secured it accordingly.¹

A writ of garnishment being served, the property is so much in custody of law, although it is never in the actual possession of the officer,² that a subsequent attachment does not take priority over it,³ unless the attachment by seizure is at suit of the same plaintiff who caused the garnishment to be levied; in which case the attachment dissolves the garnishment *pro tanto*.⁴ But the service of a second writ of *garnishment* on the same garnishee at suit of the same plaintiff is not, as a matter of law, an abandonment of the first, because the plaintiff may thereby acquire additional security in all cases where the process only secures the amount which is actually due and payable at the time of the service of the writ. In such case both writs will be allowed to stand.⁵

Garnishment will take priority over a general assignment, where the former is served before the latter is made, and the attaching creditor will have the right to have his demand settled first.⁶ But a prior assignment will take precedence over a subsequent garnishment, even though the garnishee have no notice of the assignment at the time of the service of process.⁷

1. *Durant v. Johnson*, 19 Pick. (Mass.) 544. Further see *ante*, § 409.

That writs served upon the same day have no preference over each other, see *Baldwin's Appeal*, 86 Pa. St. 483. But that they have when the hour is stated at which service was made, see *ante*, § 406.

2. *Ante*, § 612.

3. *Focke v. Blum*, 82 Tex. 436, 17 S. W. Rep. 770.

4. *Clapp v. Rogers*, 38 N. H. 435.

5. *Lawrence v. Security Co.*, 56 Conn. 423, 15 Atl. Rep. 406; *Pratt v. Young*, 90 Ga. 39, 15 S. E. Rep. 630.

As to second service not securing exempt wages, see *Collins v. Chase*, 71 Me. 434.

Where garnishee is discharged on technicality, another process may be served upon him even after a trial of the issues. The judgment is not *res adjudicata* as to him. *Marsh v. Phillips*, 77 Ga. 436.

In Illinois, a service of a second garnishment against the same garnishee at suit of another plaintiff for the same indebtedness, the last suit should be stayed to await the determination of the first suit. *Brickey v. Davis*, 9 Ill. App. 362.

6. *Sandidge v. Graves*, 1 Patt. Jr., and Heath (Va.) 101; *Glass v. Doane*, 15 Ill. App. 66. Further as to effects of assignment, see *ante*, §§ 534-546.

7. *Ante*, §§ 538-541.

And this is especially true in the assignment or transfer of negotiable instruments.¹ Since wages to become due in the future may be assigned, such assignment will take priority over a subsequent garnishment, even of wages being earned during the month in which the assignment was made.² But where the assignment is not completed because of the necessity of acceptance on the part of the creditor—the garnishee,—which acceptance has not been given, a process of garnishment served before acceptance will take priority over an order or draft drawn prior thereto.³

A trust for the benefit of creditors validly declared takes priority over a subsequent garnishment directed against the trustee.⁴

A sale or transfer of property to take priority over a garnishment must be made before the service, and if one claim under two transfers he must show that the first was made prior to the service of the process for a valuable consideration, or if not founded on such consideration, then that he accepted for value a transfer from the original transferee.⁵ Garnishment can not take priority over the rights of a mortgagee in possession under a *valid* mortgage.⁶ And while the surplus may be reached by garnishment served upon the mortgagee in possession,⁷ yet it can not be reached by process of garnishment served upon the *mortgagor's* agent in possession;⁸ nor will process served upon him prevent the mortgagee from taking possession under a statute entitling him thereto.⁹

1. Rowland *v.* Plummer, 50 Ala. 182; *ante*, §§ 567–569.

2. Manly *v.* Bitzer, 91 Ky. 596, 16 S. W. Rep. 464.

Fraudulent assignment to a wife or to any other person will not, however, take priority over a subsequent garnishment. Shaver Wagon & Carriage Co. *v.* Halsted, 78 Iowa 730, 43 N. W. Rep. 623; *ante*, § 546.

3. Rice *v.* Dudley, 34 Mo. App. 383; Northfield Knife Co. *v.* Sharp-leigh, 24 Neb. 635, 39 N. W. Rep. 788; *ante*, §§ 544 and 574.

4. Keppel *v.* Moore, 66 Mich. 292, 33 N. W. Rep. 499; *ante*, §§ 531–533.

5. Winslow *v.* Bracken, 57 Ala. 368; also, *ante*, §§ 420–421.

6. *Ante*, §§ 584–587; Holt *v.* Babcock, 63 Vt. 634, 22 Atl. Rep. 459.

7. *Ante*, § 585.

8. No garnishment can reach property in the possession of the principal defendant or his agent.

9. Booth *v.* Gish, 75 Iowa 451, 39 N. W. Rep. 704.

Garnishment will take priority over mechanics' and material men's liens where the lien notices were not as required by the statute,¹ and over any other invalid lien or mortgage.²

§ 615. **Dissolution of writ by bond.**—Since no possession is taken by the officer of the law when making service of process of garnishment there can be no bond for the forthcoming of the property to satisfy any judgment that may be recovered, as there may be in attachment by seizure.³ The only proceeding by which the garnishee may be relieved from his liability to withhold the payment of the fund or the delivery of the property to the principal defendant before the termination of the garnishment, is by the giving of a bond conditioned to pay the judgment and thereby effect a dissolution of *garnishment*. This bond has not the precise effect that a bond to pay the judgment in attachment by seizure has, for such bond in attachment by seizure not only stands in lieu of the property and releases the same but may be to pay the entire judgment against the debtor, while the bond to pay the judgment in garnishment dissolves the *garnishment in toto* when given by the principal defendant. The bond stands in lieu of the garnishment, and the plaintiff must look to it for the satisfaction of whatever judgment he may recover. In this respect it is like a bond in attachment.⁴

1. *Nesbitt v. Dickover*, 22 Ill App. 140.

2. *Ante*, § 587.

3. *Ante*, §§ 286–290.

4. *Balkum v. Reeves*, 98 Ala. 460, 13 So. Rep. 524; *Guilford v. Reeves*, — Ala. —, 15 So. Rep. 661; *Everett v. Westmoreland*, 92 Ga. 670, 19 S. E. Rep. 37; *Horton v. Summers*, 62 Ga. 302; *Moore v. Allen*, 55 Ga. 67; *Woodward v. Adams*, 9 Iowa 474; *Cunningham v. Hogan*, 136 Mass. 407; *People v. Judge of Wayne Circuit Court*, 26 Mich. 186; *Dorr v. Kershaw*, 18 La. 57; *Benton v. Roberts*, 2 La. Ann. 243; *McRae v. Austin*, 9 La. Ann. 360.

In Massachusetts the bond is given

to pay to the plaintiff the sum for which the trustee may be charged and limits the recovery to that amount and no action can be maintained thereon where the garnishee makes default and is not charged for the same. *Cunningham v. Hogan*, 136 Mass. 407.

In Alabama the recovery on the bond is the amount adjudged against the garnishee on the indebtedness he admits, but where he discloses that he has been previously garnished in another action against the defendant, judgment can not be rendered on the bond until a claim under the previous garnishment has been adjudicated, and then only for the amount remain-

§ 616. **Effect of death of garnishee.**—When a garnishee dies before having made a disclosure admitting an indebtedness, his death works a dissolution of the garnishment. His legal representatives can not be compelled to file and answer or make disclosure.¹ And furthermore, the proceeding can not (at least in Missouri) be revived against his legal representatives, even though they appear and agree to such revival.²

ing after satisfying the former. *Gulford v. Reeves*, — Ala. —, 15 So. Rep. 661.

In Georgia the statutory bond running to the plaintiff is to be filed with the clerk of the court where the suit is pending. This entitles the defendant to have the garnishment dissolved, but it does not give the clerk any authority to enter an order dissolving it. *Everett v. Westmoreland*, 92 Ga. 670, 19 S. E. Rep. 37.

In Michigan the bond, with sureties,

is to be conditioned to pay any judgments recovered against the principal defendant and abide the order of the court therein, and the statute authorizes the court, upon application after judgment is rendered thereon, to order execution to issue against the sureties as well as against the defendant. *People v. Judge of Wayne Circuit Court*, 26 Mich. 186.

1. *White v. Ledyard*, 48 Mich. 264; *Tate v. Morehead*, 65 N. Car. 681.

2. *Brecht v. Corby*, 7 Mo. App. 300; *post*, § 682.

CHAPTER XXVIII.

THE ANSWER, ITS CONTENTS AND EFFECT.

- § 617. Origin and necessity of answer. § 635. (b) Will be considered as a whole.
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Oath, signature, seal. 636. (c) Will be accepted as true.
619. Who to make the answer. 637. (d) Default interpreted as an admission of indebtedness.
620. Preparation of the answer. 638. Effect of the answer.
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623. (b) Must state garnishee's defenses. 640. (c) Admission of indebtedness will warrant a judgment for the plaintiff.
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627. (e) Must disclose existing liens. 644. (g) Special contract subjects plaintiff to its terms.
628. (f) Must show assignment. 645. (h) Showing joint indebtedness when defendant is sole and *vice versa*.
629. (g) Must show exempt character of credits or effects. 646. (i) Effect of answer when proceedings irregular. —Waiver.
630. (h) Statement on information and belief.
631. Interrogatories and answers thereto.
632. Documents appended to answer.
633. Amendment of the answer.
634. Interpretation of the answer.
(a) Construed most strongly against the garnishee.

§ 617. Origin and necessity of answer.—It is incumbent upon a person or corporation made a garnishee by the proper service of process to respond thereto in a legal way. Having

been summoned he must respond or be in default of legal process and liable to judgment therefor. Under the London custom he had the right to plead that he had no money of the defendant in his hands, etc., and the plea put the plaintiff upon his proof, or the garnishee might come into court and "wage the law," *i. e.*, come into court and state on oath that he did not owe or did not have property, etc., of the defendant in his possession.¹ Our own law of garnishment being modeled after the London custom, the general practice prevails throughout the United States; but the response of the garnishee is called by various names, such as "affidavit," "certificate," "disclosure" and "answer." The term "answer" is not only the most comprehensible, but it is the one generally used, and therefore will be the only one used in the following pages.

The garnishee must, within the time prescribed by the controlling statute, appear in the court from which the process issued and make answer to the commands of the writ, disclosing his indebtedness, etc., to the principal defendant; or judgment will be rendered against him upon default in the manner provided by law. His answer must be made in good faith or he can not claim the protection of the judgment rendered on such disclosure.² It has been held that, for good cause shown, the court may, upon its sound legal discretion, allow the garnishee to file his answer after the time provided therefor;³ but where the statute specially states that "should he fail to appear and answer (at a certain time), plaintiff shall have judgment, on motion," the court can not permit an answer to be filed after that time.⁴

An insufficient answer may generally be allowed to be amended within a proper time and for proper purposes.⁵ And when the

1. *Privilegia Londini* 258; *Smith v. 481*; *Averill v. Tucker*, 2 Cranch Cir. Posey, 2 Hill. L. (S. Car.) 471. Ct. (U. S.) 544.

2. *Lawrence v. Smith*, 45 N. H. 533; 3. *Green v. McDonnell*, 1 Bailey L. *Parker v. Wilson*, 61 Vt. 116; *Sweet v.* (S. Car.) 304; *Hunter v. Andrews*, 2 Read, 12 R. I. 121; *Farley v. Blood-* Speers (S. Car.) 73.
worth, 66 Ga. 349; *Hearn v. Adamson*, 4. *Bearden v. Metropolitan St. Ry.*

64 Ga. 608; *Sanders v. Miller*, 60 Ga. Co., 82 Ga. 605, 9 S. E. Rep. 603.

554; *Thrasher v. Buckingham*, 40 Miss. 5. *Post*, § 633.
67; *Woods v. Rice*, 4 Metc. (Mass.)

court is unable to so relieve a garnishee, who has, by pure accident or mistake, been prevented from filing his answer under oath in his own discharge, a court of equity will, under its well settled jurisdiction, grant him relief; but he must be without fault.¹

Where several garnishees have been summoned in the same case, as often happens, each must appear separately and make answer.²

§ 618. **Formalities of the answer—Oath, signature, seal.**—The garnishee's answer must be in writing. There are many provisions made to compel a personal appearance of a garnishee in court, and have his oral examination and statement on oath, but that is not what is generally contemplated by the term "answer."³ The answer must not only be in writing, but when it is the answer of a sole individual garnishee it must be signed by him in person and be by him sworn to before an officer legally authorized to administer oaths; and when it is the answer of a corporation it must be signed by a proper officer, under the corporate seal, and by him sworn to.⁴ When a copartnership firm is made a garnishee the answer of such firm need not be signed and sworn to by each member thereof. If the firm only is summoned, the firm only is bound to answer. The sworn answer of one member will bind all, on the princi-

1. Rhode Island, etc., *Bank v. Hawkins*, 6 R. I. 198.

2. *Berry v. Matthews*, 13 Md. 537; *Ball v. Young*, 52 Mich. 476, 18 N. W. Rep. 225; *State Sav. Bank v. Hosmer*, 95 Mich. 100, 54 N. W. Rep. 632.

And the clerk must docket as many cases as there are appearances. *Berry v. Matthews*, 13 Md. 537.

3. *Post*, § 647. Issue on answer. *Post*, § 631, "Answers to Interrogatories."

4. *Planters', etc., Bank v. Leavens*, 4 Ala. 753; *Burrus v. Moore*, 63 Ga. 405; *Chicago, Rock Island, etc., Ry. Co. v. Mason*, 11 Ill. App. 525; *Oliver*

v. Chicago, etc., R. R. Co., 17 Ill. 587; *St. Louis Per. Ins. Co. v. Cohen*, 9 Mo. 421; *Callahan v. Hallowell*, 2 Bay (S. Car.) 8; *Smith v. Posey*, 2 Hill L. (S. Car.) 471; *Pickler v. Rainey*, 4 Heisk. (Tenn.) 335; *Baltimore & Ohio R. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655.

A corporation must answer in the only way a corporation can answer, *i. e.*, under its corporate seal. *Baltimore & Ohio R. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655.

The answer of a corporation may be verified as in chancery. *St. Louis Per. Ins. Co. v. Cohen*, 9 Mo. 421.

ple of the general agency of each individual partner to act for all. If the separate answer of each is desired then the writ must be directed to each and properly served upon each and all.¹

§ 619. **Who to make the answer.**—The answer must necessarily be the answer of the garnishee. Where one has been served with process as a sole garnishee, he must make answer in person, but where the garnishee is a fictitious person it may be different, as will be shown. When a copartnership firm has been summoned as a garnishee, the answer of one member thereof admitting an indebtedness of the firm is sufficient to bind all, upon the principle of the general agency of each member of a firm.² But one member of a copartnership can not answer that *he* has no effects or credits of the principal defendant.³

Where one has been served as a joint garnishee, he must make answer that *he* is not liable, omitting the word jointly; for the liability of each is determined by his individual contract relation with the defendant.⁴ And where several have been named in one writ as garnishees, but mentioned as being severally liable, each must file his individual answer.⁵

The answer of a corporation, which has been duly served with process of garnishment, may be made by the proper officer cognizant of the fact, and must be sworn to by the officer making it, even though it be made under the corporate seal, but it need not of necessity be made by the person upon whom the writ was served. Furthermore, it will not be bound by the disclosure of any one except a proper officer, or person duly qualified.⁶ The answer of a corporation may be made by an

1. *Dupieris v. Hallisay*, 27 La. Ann. 132.

2. *Anderson v. Wanzer*, 5 How. (Miss.) 587.

3. *Macomber v. Wright*, 35 Me. 156.

But the answer of one member of a copartnership will not render the other members of the firm liable, unless they are brought into court by

the service required. *Kidder v. Packard*, 13 Mass. 80; *ante*, §§ 518-523.

4. *Curry v. Woodward*, 53 Ala. 371.

5. *Berry v. Matthews*, 13 Md. 537.

And the clerk must docket as many cases as there are answers. *Berry v. Matthews*, 13 Md. 537.

6. *Oliver v. Chicago & A. R. R. Co.*, 17 Ill. 587; *Chicago, Rock Island, etc.*,

attorney, although he be not a member of the corporation or its general business agent. His answer will be taken as true until disproved.¹ A foreign corporation doing business in this state may make answer by its general agent in this state, who is authorized to receive service of process on its behalf.² But the answer of a corporation made by an agent will not render the corporation liable on such answer unless the authority of the agent to make it is shown.³ The defendant has a right to demand proof of the authority of the agent to make the answer.⁴

§ 620. **Preparation of the answer.**—The answer of the garnishee should be in writing, but there is no necessity that it should be written by himself, nor that it be prepared in court. The answer should be full, and it should be clear and explicit in its statements. To that end it is proper that the answer be prepared out of court with the aid of counsel, but it must be

R. R. Co. v. Mason, 11 Ill. App. 525; *Head v. Merrill*, 34 Me. 586; *Karp v. Citizens' Nat. Bank*, 76 Mich. 679, 43 N. W. Rep. 680; *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. Rep. 500; *Duke v. Rhode Island Locomotive Works*, 11 R. I. 599; *Ballston Spa Bank v. Marine Bank*, 18 Wis. 515 (490).

The answer of a corporation in writing, under its corporate seal, and the hand of the president and secretary, verified by the oath of its legal treasurer, is sufficient. *Chicago, Rock Island, etc., R. R. Co. v. Mason*, 11 Ill. App. 525.

1. *Head v. Merrill*, 34 Me. 586.

2. *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65.

3. *Dickson v. Morgan*, 6 La. Ann. 562.

4. *United States v. Smith*, 7 La. Ann. 185.

Where one, who had made an answer for a railroad company testified that he was assistant treasurer, made

disclosure in its behalf and had knowledge of the facts stated, his authority was sufficiently shown. *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. Rep. 500.

The officer or agent of a corporation can not be compelled to appear and attend from a foreign state and submit to a personal examination under a statute. *Shafer Iron Co. v. Stone*, Circuit Judge, 88 Mich. 464, 50 N. W. Rep. 389.

Answer of municipal corporation may be made by its treasurer, upon whom process has been served and need not be made under its corporate seal. *City of Montgomery v. Van Dorn*, 41 Ala. 505. But that a municipal corporation can not generally be made a garnishee, unless its exemption is waived, see *ante*, §§ 500-504. On the contrary that a municipal corporation can not waive its exemption from process of garnishment, see *post*, § 502.

approved by the garnishee himself and accepted by him as his answer, and to this end it should be signed by him, as that is the most satisfactory mode of attesting his approval.¹ It has been said in Alabama that a court may treat an evasive answer as a nullity and enter a default (interlocutory) judgment without the necessity of the plaintiff filing exceptions to the answer.² In any event an evasive answer will be construed most strongly against the garnishee.³

§ 621. **The function of the answer.**—The courts have not been uniform in their declarations as to the function of the garnishee's answer, but it is generally considered to be in the nature of an answer in chancery when verified by affidavit, and when referred to in the judgment entry it becomes a part of the record. It is a pleading in the case, but will not be construed by the technical rules of pleading.⁴ It is also considered as evidence—and by some courts it is considered as evidence only, as will hereinafter be more fully shown,⁵ but it does not stand merely upon the same footing as the testimony of the witnesses; for whatever is admitted by it will be treated as established.⁶ Furthermore, where it does not admit an indebtedness, and its statements are controverted, it is not, like an answer in chancery, evidence for the garnishee.⁷ It is only evidence for the plaintiff, but the "effect of the answer" will be subsequently considered at length.⁸

1. *Whitney v. Cilley*, 18 N. H. 334; *Boston, etc., R. R. Co. v. Salmon Falls Bank*, 27 N. H. (7 Fost.) 455; *Taylor v. Kain*, 8 Bax. (Tenn.) 35; *Foster v. Saffell*, 1 Swan (Tenn.) 90; *Faull v. Alaska Gold and Silver Mining Co.*, 8 Sawyer Cit. Ct. 420, s. c. 14 Fed. Rep. 657.

The fact that the garnishee has been assisted by the attorney for the plaintiff in preparing an answer is not conclusive evidence of fraud. *Swanger v. Snyder*, 50 Pa. St. 218.

2. *Scales v. Swan*, 9 Porter (Ala.) 163.

3. See *post*, § 634.

4. As to the interpretation of it, see *post*, §§ 634–637.

5. *Post*, § 638.

6. *Corbitt v. Pynes*, 45 Ala. 258; *Kergin v. Dawson*, 6 Ill. (1 Gil.) 86; *Devries v. Buchanan*, 10 Md. 210; *Allen v. Hazen*, 26 Mich. 142; *Klauber v. Wright*, 52 Wis. 303.

That a written answer, not referred to in the judgment, is not a part of the record unless made so by a bill of exceptions, see *Gaines v. Beirne*, 3 Ala. 114.

7. *Dawkins v. Gault*, 5 Rich. L. (S. C.) 151.

8. *Post*, §§ 638–646.

§ 622. What answer must state—(a) Generally.—The answer must state, fully and explicitly, the extent of the garnishee's contract liability to the principal defendant at the time of service of process. Its statements should be clear and unequivocal, for if it is ambiguous and uncertain in its terms, it will not sustain a judgment for the plaintiff; and if it is evasive or frivolous it may be disregarded and subject the garnishee to judgment by default. To sustain a judgment for the plaintiff it must clearly show a certain indebtedness to the defendant, or the possession of the property belonging to him, either in express terms or by just implication, because it is the evidence on which the plaintiff's judgment must be supported.¹

§ 623. (b) Must state garnishee's defenses.—A proceeding in garnishment being in the nature of a suit by the defendant against his debtor (the garnishee), the latter must, in self-protection, set up all the defenses which he may have against the demand of the principal defendant; and he should state every fact within his knowledge which has destroyed the relationship of debtor and creditor that previously existed between them. He should make every defense against the plaintiff which he could make against his creditor (the defendant) if he were the plaintiff; for if the garnishee, in his answer, fails to disclose any fact which, if disclosed, would have prevented a judgment against him, he can not thereafter set up the judgment in garnishment in bar of another recovery on the same demand by the defendant.²

1. *Norris v. Burgoyne*, 4 Cal. 409; *Mo. 13*; *Russel v. Hinton*, 1 *Murph. People v. Cass County Judge*, 39 *Mich.* 407; *Spears v. Chapman*, 43 *Mich.* 541; *Dawson v. Maria*, 15 *Ore.* 556, 16 *Pac. Rep.* 413; *Allegheny Savings Bank v. Meyer*, 59 *Pa. St.* 361; *Moses v. McMullen*, 4 *Coldw. (Tenn.)* 242; *Adams v. McCown*, 15 *Tex.* 349; *Cullers v. City Bank of Sherman*, (*Tex. Civ. App.*) 27 *S. W. Rep.* 900.

2. *Terre Haute, etc., R. R. Co. v. Baker*, 122 *Ind.* 433; *Varian v. New England Mut. Acc. Assn.*, 156 *Mass.* 1, 30 *N. E. Rep.* 368; *Gates v. Tusten*, 89 *Mo.* 13; *Russel v. Hinton*, 1 *Murph. (N. Car.)* 468; *Bank of Northern Liberties v. Munford*, 3 *Grant (Pa.)* 232; *Conner v. Allen*, 3 *Head. (Tenn.)* 418; *Streissguth v. Reigelman*, 75 *Wis.* 212, 43 *N. W. Rep.* 1116.

If the goods sought to be reached have been taken out of the possession of the garnishee—as by a junior attachment—he may set the facts out in his own answer in order to protect himself. *Ronan v. Dewes*, 17 *Mo. App.* 306.

The defenses which the garnishee may avail himself of in his answer are, however, confined to the defenses which he has, or rather would have, against the principal defendant and do not include the defenses which the principal defendant has against the plaintiff. The garnishee must protect himself alone and stand indifferent to the action between the plaintiff and defendant. He is only entitled to inquire into the proceedings against the principal defendant to see that a valid judgment is rendered against the principal defendant; and this he does in order to protect himself, for were it not so, a judgment against him would be void and he would not be protected in paying or delivering to the plaintiff, in satisfaction of such judgment, that to which the principal defendant is entitled. If the court has jurisdiction of the principal defendant the garnishee can take no advantage of any error in the proceedings except the failure of the court to acquire jurisdiction over himself.¹

1. *Smith v. Chapman*, 6 Porter (Ala.) 365; *Jackson v. Shipman*, 28 Ala. 488; *Pierce v. Carleton*, 12 Ill. 358; *McFarland v. Birdsall*, 14 Ind. 126; *Woodruff v. French*, 6 La. Ann. 62; *Campbell v. Myers*, 16 La. Ann. 362; *Benson v. Holloway*, 59 Miss. 358; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421; *Jones v. Tracy*, 75 Pa. St. 417; *Camberford v. Hall*, 3 M'Cord (S. Car.) 345; *Foster v. Jones*, 1 M'Cord (S. Car.) 116.

A garnishee may set up the statute of limitations, in his answer, as a bar to a recovery against him. *Benton v. Lindell*, 10 Mo. 557; *Hazen v. Emerson*, 9 Pick. (Mass.) 144.

A garnishee is not bound to avail himself of the statute of frauds; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; nor is he bound to disclose a usurious transaction. *Boardman v. Roe*, 13 Mass. 104.

Nor is he obliged to disparage his title to real estate, but he is pledged

to answer interrogatories concerning the manner in which he holds such estate; and whether he has received rents and profits or proceeds of the sale of any real estate which he holds by virtue of a written agreement, and for which he is accountable. *Russell v. Lewis*, 15 Mass. 127.

The garnishee may show that the property in his possession is not the property of the defendant, but of himself, or some third person. *Albany City Ins. Co. v. Whitney*, 70 Pa. St. 248. As to an interplea in such cases, see *post*, § 671.

When a garnishee answers admitting an indebtedness that has not been paid because a third person has attached the same, he must show that the attachment is still pending or his answer will be insufficient to allow him to continue to hold the same. *Marsh v. West, etc., Mfg. Co.*, 46 N. Y. Super. Ct. 8.

It is no defense to the garnishee

The garnishee must set up such defenses, and only such defenses, as he will be willing to rely upon as defeating the plaintiff's recovery; for he can not, at the trial, set up another and repugnant defense. It is an old maxim of practice that the proof must follow the pleading.¹ If he relies upon a prior garnishment as a defense, he must allege it in his pleading.² Therefore, his answer should be so framed as not to preclude him from availing himself at the trial (if an issue is raised on the answer) of any extraneous defenses which he might otherwise interpose. If he should, in his answer, make a general denial of his liability, he could not, on the trial, make a special defense as he might have done if he had made a full statement of the facts and submitted the question of the discharge to the court.³

It is, however, only when the principal defendant is not before the court in person, that the garnishee is in a condition to question the jurisdictional legality of the proceedings or their regularity as to the defendant. When the defendant is before the court in person, the garnishee is only interested to know that the court has jurisdiction over himself, but where the principal defendant is not before the court, the garnishee is required to examine and know that the court has jurisdiction of the subject of the action; for, if it has not, no valid judgment can be entered against him, and if he satisfy the one that is rendered he may again be held liable by his creditor, the principal defendant. There can be no valid judgment against the garnishee, unless there is also a valid judgment against

that another than the plaintiff is interested in the judgment that is to be recovered against him. *Connally v. Rice*, 77 Ga. 312.

1. *First Baptist Church v. Hyde*, 40 Ill. 150.

2. *Schuerman v. Foster*, 82 Wis. 319, 52 N. W. Rep. 311.

Anything going to the abatement of the action must be pleaded by the garnishee before he pleads anything in bar of it; for example, if the process

is served upon him before suit is brought upon the claim sought to be secured, he must plead the fact in abatement, for he can not give it in evidence under a plea in payment or the like; for having pleaded in bar, he will be precluded at the trial from pleading in abatement. *Adams v. Avery*, 2 Pitts. (Pa.) 77.

3. *Royer v. Fleming*, 58 Mo. 438; *Ronan v. Dewas*, 17 Mo. App. 306.

the defendant, and for that reason alone the garnishee is entitled to look beyond the defenses which he might have made had the suit been begun by his creditor—the principal defendant.¹ But these matters are general matters for plea in abatement in like manner as he would plead other defects in the writ, which concern himself, which plea he may interpose without making answer.²

§ 624. *Same—Regarding off-set.*—The policy of the law is that the garnishee, being an indifferent and sometimes an unwilling party to the litigation between the plaintiff and defendant, shall not be disturbed in his rights. As above stated, he is permitted to interpose all the defenses which he can show against the claim of the principal defendant. The one which he most frequently desires to interpose is a claim of *set-off*. After much litigation upon the subject it is now a well established rule that the garnishee will be allowed to claim in his answer and retain for himself any demand which he might set-

1. *Pierce v. Carleton*, 12 Ill. 358; *Hinman v. Andrews Opera Co.*, 49 Ill. App. 135; *American Central Ins. Co. v. Hettler*, 46 Ill. App. 416; *Ohio, etc., R. R. Co. v. Alvey*, 43 Ind. 180; *Ryan v. Burkam*, 42 Ind. 507; *Beard v. Beard*, 21 Ind. 321; *Richardson v. Hickman*, 22 Ind. 244; *Schoppenhast v. Bollman*, 21 Ind. 280; *Crake v. Crake*, 18 Ind. 156; *Harmon v. Birchard*, 8 Blackf. (Ind.) 418; *Henny Buggy Co. v. Patt*, 73 Iowa 485, 35 N.W. Rep. 587; *McCord & Nave Mercantile Co. v. Bettles*, 58 Mo. App. 384; *Murdock v. Davenport*, 58 Miss. 411; *Oldham v. Ledbetter*, 2 Miss. (1 How.) 43; *Grisson v. Reynolds*, 2 Miss. (1 How.) 570; *Flash v. Paul*, 29 Ala. 141; *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 3.

such without legal notice, it will be reversed on the garnishee's objection. *McKey v. Cobb*, 33 Miss. 533. Regarding notice in such cases, see *ante*, § 607.

But, it seems, he can not avail himself of the fact that there had not been legal service where the judgment shows that the service was returned duly executed against the defendant who was legally before the court. *Sadley v. Prairie Lodge*, 59 Miss. 572.

The garnishee may point out the defects in the proceedings and submit a motion to quash. *Planters', etc., Bank v. Andrews*, 8 Port. (Ala.) 404. 2. *Thayer v. Ray*, 17 Pick. (Mass.) 166.

A plea in abatement because of a defective affidavit should set out the affidavit, *Banks v. Lewis*, 4 Ala. 599, on the principle that a plea in abatement must show a better writ.

A garnishee has the right of insisting upon the regularity of all proceedings against non-residents and if judgment has been rendered against one

off or avail himself of by any of the modes allowed, either by the common law or by statute, had the action been brought by the principal defendant himself, or if the proceedings had been wholly between the principal defendant and himself. He may also *recoup* himself for any damages arising out of the contract or transaction in respect to which the garnishment plaintiff seeks to hold such garnishee liable. If the contract between the garnishee and the principal defendant is untainted with fraud, the garnishee may set-off and retain a fund sufficient to satisfy all demands accruing to him, under such contract, before the service of process and payable to him at the time of the judgment. It makes no difference in this regard how uncertain or contingent the demand may have been by the terms of the contract, if the same has since become due. The indebtedness must, however, have existed at the time of the garnishment, although it may thereafter have become payable. The demands which he may deduct from his liability to the defendant are not confined to matters which are technically termed "set-off." He is further entitled to show and retain whatever he might have demanded of the defendant by way of "recoupment" or any like defense arising upon their *contract* relation,¹ even though it be a penalty arising upon a stipulation in such contract.²

1. *Powell v. Sammons*, 31 Ala. 552; *Field v. Watkins*, 5 Ark. 672; *Rankin v. Simonds*, 27 Ill. 352; *McCoy v. Williams*, 6 Ill. (1 Gilm.) 584; *Clinton Nat. Bank v. Studemann*, 74 Iowa 104; *Stedman v. Vickery*, 42 Me. 132; *Cota v. Mishow*, 62 Me. 124; *Peters v. Cunningham*, 10 Md. 554; *Smith v. Stearns*, 19 Pick. (Mass.) 20; *Boston Type Foundry v. Mortimer*, 7 Pick. (Mass.) 166; *Hathaway v. Russell*, 16 Mass. 473; *Lamb v. Stone*, 11 Pick. (Mass.) 527; *Picquet v. Swan*, 4 Mason 443; *Cleveland v. Clap*, 5 Mass. 201; *Hitchcock v. Lancto*, 127 Mass. 514; *Doyle v. Gray*, 110 Mass. 206; *Firebaugh v. Stone*, 36 Mo. 111; *Brown v. Warren*, 43 N. H. 430; *Brown v. Brown*, 55 N.

H. 74; *Boston, etc., R. R. Co. v. Oliver*, 32 N. H. 172; *Boardman v. Cushing*, 12 N. H. 105; *Swamscot Machine Co. v. Partridge*, 25 N. H. (5 Fost.) 369; *Lynde v. Watson*, 52 Vt. 648; *Seo-field v. Sanders*, 25 Vt. 181; *Farmers' Bank v. Gettinger*, 4 W. Va. 305; *Gage v. Chesebro*, 49 Wis. 486; *McLaughlin v. Swann*, 18 How. 217; *Picquet v. Swan*, 4 Mason (U. S. Cir. Ct.) 443.

2. *Succession of Thompson v. Allison*, 28 La. Ann. 733.

A garnishee, holding certain notes intrusted to him before the service of process, and upon which the defendant's liability as indorser has become fixed before the time of answer, may,

The only demand, however, which he can set off in garnishment is a demand against the identical person or persons named as defendant or defendants in the garnishment. If he claims a set-off against the defendant and another jointly, it will not be allowed because he could not assert it against the defendant alone.¹ But this rule does not apply where a co-partnership was indebted to the defendant and only a part of the members were summoned, for in such a case those who are summoned may be allowed the benefit of such off-sets, as they,

when the maker and indorser are all insolvent, set up the amount of the notes against the sum which he owes to the principal defendant, and the fact that the liability of the defendant was not fixed until after the service of the process will not affect the case. *Lannan v. Walter*, 149 Mass. 14, 20 N. E. Rep. 196.

If the defendant be insolvent and owe the garnishee on a note not due, and the garnishee have no security therefor, he is not bound to risk the loss of his debt in the answer to garnishment. *Schuler v. Israel*, 120 U. S. 506, 7 S. Ct. Rep. 648.

An answer of a garnishee stating that the defendant holds his note for \$1,200, to which he has a set-off, but until a settlement is had between them he does not know how much is due, will not permit a judgment to be rendered for the plaintiff. *Allen v. Morgan*, 1 Stew. (Ala.) 9. As to answers, see *post*, § 643.

An answer showing that the defendant owes the garnishee certain notes and drafts and accounts left with the defendant for collection, and representing a sum greater than that which the garnishee owes to the defendant, will not be an off-set against the plaintiff in garnishment, unless it is shown that the defendant has received the notes from the garnishee as money or at a certain price, or has received

money on them, or has credited them on his claim against the garnishee. *Allen v. Erie City Bank*, 57 Pa. St. 129.

A garnishee, answering that he had signed a promissory note as co-surety with the principal defendant, and that he himself had paid the note, was permitted to set-off one-half of the amount so paid, as that was the amount to which he would be entitled to call upon the principal defendant to pay. *Strong v. Mitchell*, 19 Vt. 644.

The fact that the garnishee is the defendant's assignee for the benefit of creditors will not prevent him from setting off demands which he has purchased at a discount. *Emerson v. Wallace*, 20 N. H. 567.

Expenses.—The garnishee may, in his answer, set-off and retain the amount of his reasonable costs in defending the garnishment proceedings. *Swamscot Mach. Co. v. Partridge*, 25 N. H. (5 Fost.) 369; *Guild v. Holbrook*, 11 Pick. (Mass.) 101. And commissions agreed upon for services rendered. *Guild v. Holbrook*, 11 Pick. (Mass.) 101.

But not any sum to indemnify himself for the general expenses of the garnishment, such as attorney's fees. *Adams v. Cordis*, 8 Pick. (Mass.) 260; *Guild v. Holbrook*, 11 Pick. (Mass.) 101.

1. *Story v. Kemp*, 55 Ga. 276.

together with the other members, if summoned, would be entitled against the defendant.¹ He will also be permitted to show and retain a fund which is due to himself and another from the identical defendant or defendants.² Likewise where two persons are summoned as being jointly indebted to the defendant, they may each set off their individual demands against him.³

A demand susceptible of being set off by the garnishee is only the right which accrues to him in the same character or capacity as that in which he is served. For example, if he is summoned in his individual capacity he can not set off a demand which he has as an administrator against the principal defendant.⁴

The garnishee can not set off any unliquidated demands such as arise from torts.⁵ Nor can he set off and retain any demand depending upon contingencies or conditions precedent which may or may not happen; nor an off-set merely because he is an indorser and may become liable thereof; nor will the payment of the note before it becomes due and before making answer entitle him to claim it as a set-off.⁶ Nor can he set off the amount of an accommodation note, on which he is surety for the defendant, which is not due at the time of the service.⁷ One can not, because of having other contracts with the principal defendant, which have not matured, set off any prospective loss arising upon them against an actual accrued indebted-

1. *Hathaway v. Russell*, 16 Mass. 473.

2. *Manufacturer's Bank v. Osgood*, 12 Me. 117.

A garnishee who has assigned a non-negotiable chose in action against the defendant to a third person before service of process, taking in return an instrument in writing from such third person by which he agreed to hold the claim for the benefit of both and not dispose of it without the assignor's (garnishee's) consent, and that "any and all benefits and emolu-

ments and advantages at any time, directly or indirectly, derived from said claim," may set off and claim the same for their joint benefit. *Nutter v. Framingham & Lowell R. R. Co.*, 132 Mass. 427.

3. *Brown v. Warren*, 43 N. H. 430.

4. *Woodward v. Tupper*, 58 N. H. 577; *Thomas v. Hopper*, 5 Ala. 442.

5. *Hathaway v. Russell*, 16 Mass. 473.

6. *Martin v. Solomons*, 10 Rich. (S. Car.) 533.

7. *Roig v. Tim*, 103 Pa. St. 175.

ness to the defendant upon a complete contract.¹ One garnished for the wages of an employe can not set off the same as a payment to himself of a debt which the employe owes him, unless there is some agreement between him and the defendant that the salary was to be applied to the payment of such debt.² Nor can the garnishee maintain, as a defense, a mutual agreement for the payment of the debt, unless the principal defendant was privy to such agreement.³

A claim that personal property in possession of the garnishee should be allowed, because the same is held in pledge or subject to lien, is not technically set off because it is not an indebtedness; but such claim should be fully stated.⁴ And where personal property covered by lien is sold by a receiver, the garnishee can only set off the amount of the debt due to him from the principal defendant, other than that for which the lien existed.⁵

Where the garnishee in his answer claims an off-set against the demand of the plaintiff on account of the defendant, and a third person interposes a claim thereto and sustains it, the plaintiff in garnishment has no right to complain, for the defendant could not have recovered in such case.⁶

Since all off-sets, whether in garnishment proceedings or other suits, must be made by the defendant in the right or character in which he is sued, a garnishee can not, in proceedings against him individually, set off a claim which he holds as administrator of another person against the defendant.⁷

§ 625. (c) **Must state what is due.**—The garnishee must state what, if anything, is due to the principal defendant; or what effects he holds belonging to the principal defendant. This he must do for two reasons; first, that his answer may

1. *Gomilla v. Milliken*, 41 La. Ann. 116, 5 So. Rep. 548.

2. *Archer v. Whiting* (*Archer v. People's Sav. Bank*), 88 Ala. 249, 7 So. Rep. 53.

3. *Matthews v. Robinson*, 33 Ala. 320.

4. See *post*, § 627.

5. *Bullock v. Foster*, 44 N. H. 38.

6. *Union India Rubber Co. v. Mitchell*, 37 Ala. 314; *Union, etc., Co. v. Mitchell*, 1 Ala. Sel. Cas. 317.

7. *Thomas v. Hopper*, 5 Ala. 442.

not be equivocal, and second, it must appear from his answer what amount is due with such certainty that the court may definitely determine the sum; for no judgment can be entered in favor of the plaintiff unless it appear from the answer what amount of money is due to the principal defendant, or what property is in the garnishee's hands belonging to him. The answer must show the indebtedness of the garnishee at the time of service of process upon him, for it is only such indebtedness that can be reached by process of garnishment. In some states he is required to show what is *payable* on such indebtedness at the time of such service, but in other states he is also required to show what may become payable in the future on his present existing contract with the defendant. This is governed by the local statutes, some of which make sums *payable* at the time of service amenable to the process, while others make "present indebtedness payable in the future," available under the writ.¹

1. *Branch Bank v. Poe*, 1 Ala. 396; *Central Plank Road Co. v. Sammons*, 27 Ala. 380; *Lady Ensley Furnace Co. v. Rogan*, 95 Ala. 594, 11 So. Rep. 188; *New Orleans, M. & C. R. R. Co. v. Long*, 50 Ala. 498; *Norris v. Burgoyne*, 4 Cal. 409; *Loyless v. Hodges*, 44 Ga. 647; *Mayer v. Chattahoochie Nat. Bank*, 51 Ga. 325; *Talbott v. Tarlton*, 5 J. J. Marsh. (Ky.) 641; *Peet v. Whitmore*, 16 La. Ann. 48; *Bean v. Bean*, 33 N. H. 279; *Franklin Ins. Co. v. West*, 8 Watts & S. (Pa.) 350; *ante*, §§ 476 and 480.

An answer which acknowledges no present indebtedness to the defendant nor any future indebtedness except upon some contingent and uncertain event will not warrant a judgment against the garnishee. *Coleman v. Fennimore*, 16 La. Ann. 253; *ante*, § 481.

The answer of a garnishee, after being delayed more than two months on account of sickness, that he "is indebted" to the principal defendant,

followed by payment of the money into court, is a sufficient admission that the indebtedness existed at the time of service to warrant a judgment in favor of the plaintiff, and to protect the garnishee against any future liability to the principal defendant. *Barber v. Howd*, 85 Mich. 221, 48 N. W. Rep. 539.

An answer by the garnishee that the defendant is in his employ, but by agreement he is allowed to draw his salary each week in advance, and stating the days on which the defendant drew his salaries, showing that he did not always draw it in advance, but sometimes after it was earned, and that he has drawn it after it was earned since the service of garnishment will not warrant a charge to the jury that if they believe the evidence they must find for the garnishee. *Archer v. Whiting* (*Archer v. People's Sav. Bank*), 88 Ala. 249, 7 So. Rep. 53.

Under statutes which provide for the appropriation of sums becoming due in the future upon a present existing indebtedness, the answer must show what is due at the time of filing the same (and it will support a judgment for the plaintiff) although nothing was *due* when the writ was served; but that which will fall due in the future—as annual installments—can not be held as due at the time of rendering judgment and can not be secured thereby, because the plaintiff in garnishment can not secure by his action what the principal defendant could not have secured by an independent suit.¹

§ 626. (d) **Must state where payable.**—That the answer of the garnishee shall state where his indebtedness to the principal defendant is payable is a matter of the greatest importance, especially where the principal defendant is not in court; for it is only debts which are payable within the jurisdiction of the court that can be properly subjected to the process of such court. It is a fundamental principle of all attachments, that the court must have jurisdiction of the property as of a proceeding *in rem* when it has no general jurisdiction over the defendant and his property. Therefore, while the citizens of other states may use the courts of this state as freely as our own citizens, even against a non-resident defendant, yet the court is absolutely without jurisdiction to render a judgment against the defendant, unless his property is present to be ap-

1. *Palmer v. Noyes*, 45 N. H. 174; *ante*, § 515, *et seq.*

An answer showing a contract for work payable in monthly installments as the work progresses, providing that a certain per cent. be retained to insure the faithful performance of the contract, and providing for the payment of such percentage on the completion of the work, such percentage will not warrant a judgment for the plaintiff unless it is also shown that the contract has been faithfully performed. Until then the contractor could not recover. *American Forcible Pow-*

der Mfg. Co. v. Locust Mountain Coal and Iron Co., 166 Pa. St. 289, 31 Atl. Rep. 90.

An answer showing that the garnishee held the property as collateral security, and that the debtor has released all claim upon it, will be sufficient to sustain a judgment for the plaintiff. *Merchants' and Manufacturers' Nat. Bank v. Baeder Glue Co.*, 164 Pa. St. 1, 30 Atl. Rep. 290, 35 W. N. C. 69. As to debts secured by mortgage or held as indemnity, see *ante*, §§ 584-587.

propriated. A debt is property and has a *situs* as distinctly as tangible property. The *situs* of the debt, as well as of tangible property, must be within the jurisdiction of the court. The *situs* of a debt is the place where such debt is payable, which is impliedly the domicile of the creditor, unless expressly stated in the contract to be elsewhere; therefore it should appear by the answer that the debt is payable within the jurisdiction of the court, or a judgment thereon in behalf of the plaintiff may be illegal and voidable, or the garnishee be thereafter compelled to pay the same demand to the defendant, and to warrant a judgment for the defendant the *situs* must be shown to be without the jurisdiction of the court.¹

§ 627. (e) **Must disclose existing liens.**—In order that the garnishee may be allowed the benefit of his mortgage or other

1. Walker v. N. K. Fairbanks & Co., 55 Mo. App. 478; Wyeth Hardware & Mfg. Co. v. Lang, (Mo. Sup.) 29 S. W. Rep. 1010; Young v. Ross, 31 N. H. (11 Fost.) 201; Douglas v. Phoenix Ins. Co. of Brooklyn, 63 Hun (N. Y.) 393, 18 N. Y. S. 259; Williams v. Ingersoll, 89 N. Y. 508; Ward v. Morrison, 25 Vt. 593; Craig v. Gunn, 67 Vt. 92, 30 Atl. Rep. 860; Central Trust Co. of New York v. Chattanooga R. & C. R. Co., (Cir. Ct.) 68 Fed. Rep. 685.

Where there is no contract to the contrary, wages or other debts payable from one non-resident to another non-resident living in the same state is payable in that state, and can not be reached by garnishment in another state, although the garnishee is there subject to suit by process served on its local agents. Central Trust Co. of New York v. Chattanooga R. & C. R. Co., (Cir. Ct.) 68 Fed. Rep. 685.

Notes made payable to a non-resident at his place of residence can not be reached by garnishment of a railroad company extending into another state, where suit is brought, although the same be given for wages due from

the garnishee. Atchison, T. & S. F. R. Co. v. Maggard, (Colo. App.) 39 Pac. Rep. 985.

If the surplus is payable in this state, a court may render judgment against a garnishee therefor, although such surplus arise from the sale of collaterals held by the garnishee in another state. Merchants' and Manufacturers' Bank v. Baeder Glue Co., 164 Pa. St. 1, 35 W. N. C. 69, 30 Atl. Rep. 290.

Credits in the possession of non-residents have no *situs* in Vermont and can not be there held by garnishment. Craig v. Gunn, 67 Vt. 92, 30 Atl. Rep. 860.

In Vermont no one can be held liable as a garnishee unless he is a resident of that state, therefore a corporation organized under the laws of another state, where its principal office and place of business is, can not be made a garnishee, although it does business there. Craig v. Dunn, 67 Vt. 92, 30 Atl. Rep. 860. The domicile of a corporation is where it is organized. *Ante*, §§ 492 and 493.

lien acquired prior to the service of process of garnishment, he must disclose in his answer that he has such a prior lien. It is only in that way the court can become informed of the fact, and, unless it is so informed, a judgment may be rendered on default against the garnishee on the allegations of the plaintiff's affidavit.¹

When the garnishee's answer shows that he holds the property of the principal defendant as indemnity, although it does not show for what amount, no judgment can be entered against him, because no judgment can be rendered when the amount is uncertain;² but the liability of the garnishee who holds property as indemnity being only for the surplus, he should show the amount for which he holds it, for if he does not, the plaintiff may cause him to make a further disclosure.³

1. *Farwell v. Howard*, 26 Iowa 381; *Dryden v. Adams*, 29 Iowa 195; *Security Loan Assoc. v. Weems*, 69 Ala. 584; *Edwards v. Levisohn*, 80 Ala. 447, 2 So. Rep. 161; *Stedman v. Vickery*, 42 Me. 132; *Yongue v. Linton*, 6 Rich. L. (S. Car.) 275.

In a state where the process will secure indebtedness becoming due in the future, a garnishee answering that he holds certain property as collateral security must show whether he will not be "indebted in the future to the defendant by a contract then existing." *Security Loan Assoc. v. Weems*, 69 Ala. 584.

Naked possession not sufficient.—In order that the garnishee may be allowed to hold, as against the plaintiff, personal property in his possession belonging to the principal defendant, his answer must disclose a lien, either legal or equitable, upon the property, or some right created by contract, custom or otherwise, entitling him to retain the same until his demand against the defendant is satisfied. If he have the mere naked possession, and the defendant has the present

right of possession, of it, so that he might lawfully take it out of the hands of the garnishee, or authorize another so to do, then the property is bound by the process, and the plaintiff will be entitled to a judgment against the garnishee. *Allen v. Hall*, 5 Metc. (Mass.) 263.

2. *Thompson v. Fischesser*, 45 Ga. 369; *First Nat. Bank v. Perry*, 29 Iowa 266; *Dryden v. Adams*, 29 Iowa 195. *Post*, § 644.

3. *Spencer v. Moran*, 80 Iowa 374, 45 N. W. Rep. 902. As to "Further Disclosure" see *post*, § 647.

Where chattels have been assigned to be sold and the proceeds applied by the assignees in satisfaction of a debt due them, they can not, before such sale, be held liable for the surplus as garnishees because it is uncertain and speculative what the amount of proceeds will be; and the court can not try and determine the question and amount of surplus. *Carter v. Bush*, 79 Tex. 29, 15 S. W. Rep. 167; *ante*, § 481.

Where a garnishee discloses that he held a note as pledge of a debt which

If a prior attachment has been made upon the property, the garnishee should state that fact in his answer, and if he admits a liability to the defendant he must show that such attachment is still pending or he will not be discharged because thereof.¹

§ 628. (f) **Must show assignment.**—A garnishee who, having been indebted to the principal defendant, has notice before garnishment that such defendant has assigned his demand against him must, in his own defense, show that fact to the court in his answer which states an indebtedness, for since such assignment and notice binds him to pay his debt to the assignee,² and since without disclosing the fact to the court, a judgment may be rendered against him and he be compelled to pay it, he must relieve himself by showing that his liability has been shifted, or he may be twice held liable on the same demand.³ A garnishee's answer which, while admitting a firm

the defendant owed him and shows that the note was for a larger sum than the debt, and shows also that he has sold the note for the amount of the debt, he must further show that the sale was made in good faith and for a fair price or he will be charged for the difference between his debt and the amount of the note. *Peaslee v. Doane*, 39 N. H. 466.

One having held chattels in pledge, it having been necessary for him to sell the same to satisfy his demand, he may be allowed commissions for selling the property and he may take the same out of the balance of proceeds, if he claim the same in his answer. *Steele v. Thompson*, 38 Mo. App. 312.

Fraudulent mortgage or deed.—It is only where the transaction between the garnishee and principal defendant is untainted with fraud that the mortgagee is entitled to all but the surplus, and though the answer show a conveyance absolute in form, yet the gar-

nishee may hold absolutely and not on condition of payment to him of the consideration of the conveyance. *Thompson v. Pennell*, 67 Me. 159; *ante*, § 546.

1. *Marsh v. West, etc., Mfg. Co.*, 46 N. Y. Sup. Ct. 8.

2. *Ante*, §§ 534-546.

3. *Foster v. White*, 9 Port. (Ala.) 221; *Large v. Moore*, 17 Iowa 258; *Hawes v. Langton*, 8 Pick. (Mass.) 67; *Porter v. West*, 64 Miss. 548, 8 So. Rep. 207; *Byars v. Griffin*, 31 Miss. 603; *Coleman v. Scott*, 27 Neb. 77, 42 N. W. Rep. 896; *Hanaford v. Hawkins*, (R. I.) 28 Atl. Rep. 605.

Assignee as a party.—When the garnishee answers showing an assignment, he relieves himself of liability, unless the assignee is brought in by some local statutory proceedings and made a party to the suit. The assignee is permitted, under some statutes, to intervene and have his right determined and under some statutes he may be brought in. If a garnishee

indebtedness, alleges that he had notice of an assignment before service of process of garnishment was made on him will, unless contradicted by proof, be sufficient to discharge him.¹

Since the assignment of negotiable instruments render the garnishee liable to the assignee, in many instances, without notice, it is his imperative duty, if he knows or believes, when he answers, that the note was assigned before process of garnishment was served upon him, to state that fact in his answer; for if he fails so to do and suffers a judgment in the proceeding to be entered against him, he will nevertheless be still liable to the holder of the note.² But when he answers, disclosing the fact that the notes made by him have been transferred before the service of process of garnishment, no judgment can be rendered against him unless it be after bringing in the transferee or pursuing the course pointed out by special statute in case he can not be found.³

has admitted an indebtedness without disclosing an assignment, the assignee can not intervene in the suit, but judgment may be rendered against the garnishee on the answer. *Hanaford v. Hawkins*, (R. I.) 28 Atl. Rep. 605; *Porter v. West*, 64 Miss. 548, 8 So. Rep. 207. Further as to intervention of claimant, see *post*, § 671.

Where the assignee has been made a garnishee and alleges in his answer that an assignment has been made to him, his omission to name the creditors for whose benefit the assignment was made will not be a sufficient omission to render him liable on his answer. *Lightfoot v. Rupert*, 38 Ala. 666.

1. *Thompson v. Shelby*, 11 Miss. (3 Smed. & M.) 296.

As to the contradiction of the answer, the raising of an issue and the burden of proof thereon, see *post*, § 647 *et seq.*

When a garnishee's answer alleges an assignment prior to the service of process upon him, the oath of an at-

torney in fact that he believes the assignment was made subsequent to the service of process will be sufficient to put the answer in issue. *Foster v. Walker*, 2 Ala. 177.

It has been held that the question of *fraud* in the assignment may be tried between the plaintiff and garnishee where the latter has been summoned on a *fi. fa.* and has alleged such assignment. *Doggett v. St. Louis Marine and Fire Ins. Co.*, 19 Mo. 201.

2. *Phipps v. Rieley*, 15 Ore. 494, 16 Pac. Rep. 185; *Parker v. Wilson*, 61 Vt. 116, 17 Atl. Rep. 747.

3. *Simmons v. Guyon*, 57 Ala. 111.

A garnishee having shown in his answer that a negotiable instrument has been transferred to a third person whom he names, he can not, on the trial of the issue raised on his answer be permitted to show that it was assigned to another person before service of process upon him. *John R. Davis Lumber Co. v. First Nat. Bank*, 84 Wis. 11, 54 N. W. Rep. 108. His proof must follow his pleading.

Necessity of showing open accounts—

§ 629. (g) **Must show exempt character of credits or effects.**

—It is not only the privilege of the garnishee, when the principal defendant is not personally in court, to show by his answer that the effects which he owes to the principal defendant, or the property which he has in his hands belonging to such defendant, is a fund or property which such defendant might claim as exempt from execution and attachment, and thereby relieve himself from liability to the garnishment plaintiff to the amount of the exemption;¹ but in some states it is made obligatory upon the garnishee to preserve such exempt fund or property for the principal defendant, if he know that such is its character, where there has not been personal service or

books of account.—An open account showing an indebtedness to a defendant is a debt susceptible of garnishment. *Porter v. Young*, 85 Va. 94, 6 S. E. Rep. 803.

But books of account are not susceptible of attachment by direct seizure so as to constitute an attachment of the debts mentioned in them. *Brower v. Smith*, 17 Wis. 410; *Bradford v. Gillespie*, 8 Dana (Ky.) 67; *Clark v. Warren*, 7 Lans. (N. Y.) 180.

But it is not the person who holds the book account who may be held liable as a garnishee; it is the person who owed the debt evidenced by the account. *Ide v. Harwood*, 30 Minn. 191.

Under a special statute, however, providing that the books might be seized and that every person appearing thereby to be indebted may summon as garnishees, all the claims evidenced by them may be effectually reached, including notes which may be found therein. *Boone v. McIntosh*, 62 Miss. 744.

An assignee of book accounts for collection may be held liable as a garnishee in states making an agent for collection amenable to the process. *Mitchell v. Green*, 60 N. H. 582; *Mitch-*

ell v. Green, 62 N. H. 588. See *ante*, § 576.

This being true, it may be necessary for the garnishee, by his answer, to disclose the book accounts held by him; but the entries upon books is not conclusive evidence of the indebtedness, as where a corporation answering by its agent states a balance erroneously, carried to the defendant's account. *Bigelow v. York, etc., R. R. Co.*, 37 Me. 320.

If book accounts are held as indemnity under a mortgage, any surplus remaining in the hands of the mortgagee after the satisfaction of his demand will be subject to garnishment at suit of the creditors of the owner of the books. *Glass v. Doane*, 15 Ill. App. 66.

1. *Craft v. Hubbard*, 93 Ala. 22, 9 So. Rep. 328; *Emmons v. Southern Bell Tel. Co.*, 80 Ga. 760, 7 S. E. Rep. 232; *Mull v. Jones*, 33 Kan. 112; *Chicago, Rock Island, etc., Ry. Co. v. Mason*, 11 Ill. App. 525; *Staniels v. Raymond*, 4 Cush. (Mass.) 314; *Union Pac. Ry. Co. v. Smersh*, 22 Neb. 751, 36 N. W. Rep. 139; *Winterfield v. Milwaukee & St. Paul R. R. Co.*, 29 Wis. 589; *Watkins v. Blatchinski*, 40 Wis. 347.

appearance of the defendant. And when it is so made his imperative duty, he must claim such exemption, or a satisfaction of the judgment acquired against him by the plaintiff in garnishment will not relieve him from the demand which the principal defendant may thereafter make against him for such exempt fund or property.¹ And it is not enough that he show that the property is of the *kind* that the statute makes exempt, but he must show that it is in fact exempt, or he will not be protected.² The claim of exemption must be clear and certain, or it will not be allowed.³ A special statute in Alabama requires an inventory setting forth the exempt articles, and if the same is not filed, or is too indefinite, the plaintiff may elect to demand judgment by default against the garnishee, or insist on a fuller inventory, which the court may, in its discretion, allow.⁴ The reason why the principal defendant may recover from the garnishee any fund or property which is exempt by statute, regardless of the judgment against the garnishee for the same, is that the proceedings between the plaintiff and the garnishee are not *res adjudicata* as to him.⁵

When the principal defendant is himself in court it is not the duty of the garnishee to claim an exemption for him. He must do so himself or he will be deemed to have waived his right thereof, and be bound by a judgment against the garnishee.⁶ The defendant's claim of exemption must be asserted by him without delay, for if he permits judgment to be

1. *Lady Ensley Furnace Co. v. Rogan*, 95 Ala. 594, 11 So. Rep. 188; *Chicago, etc., R. Co. v. Ragland*, 84 Ill. 375; *Welker v. Hinze*, 16 Ill. App. 326; *Stetson v. Cleneay*, 14 Ind. 453; *Daniels v. Marr*, 75 Me. 397; *Lock v. Johnson*, 36 Me. 464; *Mace v. Heath*, 34 Neb. 790, 52 N. W. Rep. 822; *Missouri Pac. Ry. Co. v. Whipsker*, 77 Tex. 14, 13 S. W. Rep. 639. *Contra*, *Moore v. Chicago, etc., Ry. Co.*, 43 Iowa 385.

2. *Rollins v. Allison*, 59 Vt. 188, 10 Atl. Rep. 201.

3. *Smith v. Chicago & Northwestern Ry. Co.*, 60 Iowa 312.

4. *Tonsmere v. Buckland*, 88 Ala. 312, 6 So. Rep. 904; *Buckland v. Tonsmere*, 90 Ala. 503, 8 So. Rep. 68.

5. *Curran v. Fleming*, 76 Ga. 98.

6. *Uhrich v. Gockley*, (Pa. Com. Pl.) 2 Pa. Dist. R. 350; *Reed v. Penrose*, 2 Grant. (Pa.) Cas. 472, 36 Pa. St. 214.

entered against the garnishee he can not thereafter claim an exemption.¹

Where an exemption has been claimed for the principal defendant no judgment can be entered in favor of the plaintiff, unless he contests the claim by joining an issue thereon in the manner hereinafter shown.²

The claim of exemption to be interposed is sometimes held to be the exemption allowed by the laws of the state in which the principal defendant resides,³ but another class of cases maintains that a statute of exemptions affects the remedy and therefore that it is the statute governing the court where the action is brought that controls in the matter of exemptions, and that the statute of exemptions of another state can not be set up as a defense,⁴ unless such property is also exempt by the laws of the state where the action is brought.⁵

§ 630. (h) **Statement on information and belief.**—A garnishee who can not state facts in his answer as of his own positive knowledge may make a full and fair statement of them upon information and belief and it will be taken as true and conclusive, on the principle that it is the best evidence

1. *Randolph v. Little*, 62 Ala. 396; *Iliff v. Arnott*, 31 Kan. 672.

Where the defendant has waived his right of exemption the garnishee is in no position to insist upon it. *Bibb v. Janney*, 45 Ala. 329.

What not a waiver.—By giving a bond with security to discharge the garnishment (*ante*, § 615) the defendant's right to insist upon his exemption is not waived whether the garnishee claims it or not, and furthermore, if the defendant's claim be well founded, no judgment can be recovered on the bond which was given to dissolve the garnishment. *Born v. Williams*, 81 Ga. 796, 7 S. E. Rep. 868.

2. *Young v. Louisville and N. R. Co.*, 95 Ala. 454, 11 So. Rep. 121; *Davenport v. Swan*, 9 Humph. (Tenn.) 186; *post*, § 651.

3. *Hill v. Loomis*, 6 N. H. 263; *Haskill v. Andros*, 4 Vt. 609.

4. *Wabash Ry. v. Dougan*, 142 Ill. 248; *American Cent. Ins. v. Hettler*, 46 Ill. App. 416; *Roche v. Rhode Island Ins. Asso.*, 2 Ill. App. 360; *Leiber v. Union Pacific Ry. Co.*, 49 Iowa 688; *Carson v. Memphis and C. R. Co.*, 88 Tenn. 646, 13 S. W. Rep. 588.

5. *Leiber v. Union Pacific R. R. Co.*, 49 Iowa 688. See *ante*, § 559.

There is no exemption against a claim for purchase-money. *Howard v. Lakin*, 88 Ill. 36.

Proof.—In Alabama the statute makes a claim of exemption *prima facie* evidence of its correctness. In such state therefore the burden of proving its incorrectness is upon the garnishment plaintiff. *Todd v. McCravey*, 77 Ala. 468.

obtainable.¹ But where an account was of long standing and the garnishee answered, without stating the items of the account, that he believes that the balance is greatly in his favor, it was not sufficient to discharge him, but a judgment was entered against him. Such belief is not the best evidence obtainable. If, after proper time given him for that purpose, he had set forth so much of the account as he had kept, and also the other items according to his best recollection and belief, his answer would have been sufficient in that regard.² Under a statute requiring that the garnishee shall "admit or deny his indebtedness, or that he has effects in his hands belonging to the defendant; and if he is unable to do so his inability must appear in his answer, together with all the facts plainly, fully and distinctly set forth, so as to enable the court to give judgment thereon," an answer by an agent "to the best of his knowledge and belief" will not be sufficient without further pointing out what facts he knows and what facts he believes, together with the grounds of such belief.³

The garnishee is under no obligation to state the information he has received from the communications of other persons, but when he is satisfied of its truth there is no reason why such fact may not be stated by him in his answer.⁴

§ 631. **Interrogatories and answers thereto.**—It is quite a common practice for the plaintiff in the first instance to file interrogatories directed to the garnishee, that the same may be answered by him; and thereby directly, explicitly and without evasion, to arrive at the facts which the plaintiff desires to ascertain and which are necessary to show liability or lack of liability of the garnishee. Some states do not require that the interrogatories be filed in the first instance, but that the gar-

1. *Ormsby v. Anson*, 21 Me. 23; *Bostwick v. Bass*, 99 Mass. 469; *Fay v. Sears*, 111 Mass. 154; *Clinton Bank v. Bright*, 126 Mass. 535; *Harris v. Aiken*, 3 Pick. (Mass.) 1.

2. *Shaw v. Bunker*, 2 Metc. (Mass.) 376.

3. *Plant v. Mutual Life Ins. Co.*, 92 Ga. 636, 19 S. E. Rep. 719.

4. *Hawes v. Langton*, 8 Pick. (Mass.) 67; *Kelly v. Bowman*, 12 Pick. (Mass.) 383; *Willard v. Sturtevant*, 7 Pick. (Mass.) 194; *Cleveland v. Clap*, 5 Mass. 201.

nishee shall make a disclosure of the contract relations between him and the principal defendants, and then, if the answer is not full, clear and direct, that he may be required to appear in person and answer *relevant* interrogatories, or that he make further disclosure upon written interrogatories filed therefor. In any event, the garnishee must answer all pertinent and relevant interrogatories without equivocation, for if he neglect or refuse to answer, or answers evasively or equivocally, he is in danger of having a default entered against him for want of such answer.¹ Such answers will not be regarded merely as pleadings, but will be considered as evidence on the part of the plaintiff, and, if used at all, the whole must be read and not merely the part which charges the garnishee.² The purpose of interrogatories is to elicit the truth from the garnishee, and when he has made a full, fair, direct and complete answer thereto touching his indebtedness or the disposition and whereabouts of property which is in his possession, or may have been sometime prior to the service of process, the court will protect him from further and annoying interrogatories.³

1. *Roberts v. Landecker*, 9 Cal. 262; *Penn v. Pelan*, 52 Iowa 535; *Thompson v. Silvers*, 59 Iowa 670; *Marchand v. Noyes*, 33 La. Ann. 882; *Vason v. Clarke*, 4 La. Ann. 581; *Dickson v. Morgan*, 7 La. Ann. 490; *Elder v. Rogers*, 11 La. Ann. 606; *Battles v. Simmons*, 21 La. Ann. 416; *Daigle v. Bird*, 22 La. Ann. 138; *Ober v. Matthews*, 24 La. Ann. 90; *Cockfield v. Tourres*, 24 La. Ann. 168; *Bell v. Kendrick*, 8 N. H. 520; *Struber v. Klein*, 17 Phila. (Pa.) 12; *Devoll v. Brownell*, 5 Pick. (Mass.) 448; *Neally v. Ambrose*, 21 Pick. (Mass.) 185; *Boardman v. Roe*, 13 Mass. 104; *Hobson v. Kelly*, 87 Mich. 187, 49 N. W. Rep. 533; *Herst v. Beckhaus*, (Pa. Com. Pl.) 12 Pa. Co. Ct. Rep. 582; *Herst v. Beckhaus*, 2 Pa. Dist. Rep. 199; *Rhine v. Danville, etc.*, R. R. Co., 10 Phila. (Pa.) 336; *Wood v. Wall*, 24

Wis. 647; *Oberteuffer v. Harwood*, 2 McCrary Cir. Ct. 415; *Picquett v. Swan*, 4 Mason (U. S. Cir. Ct.) 443.

2. *Devries v. Buchanan*, 10 Md. 210.
3. *Carrique v. Sidebottom*, 3 Mete. (Mass.) 297; *State Nat. Bank v. Boatner*, 39 La. Ann. 843.

The garnishee is not required to answer irrelevant interrogatories. *Rhine v. Danville, etc.*, R. R. Co., 10 Phila. (Pa.) 336.

The communications between an attorney and his client are not privileged, as regarding the former's answer to interrogatories, touching assets of his client in his hands when he has been summoned as a garnishee. "Privileged" communications are those regarding matters which a client has *confided* to his attorney. The fact who is an attorney's client, when the relationship began, what amount of

If the garnishee declines or neglects to answer fully or answers evasively and unsatisfactorily to the plaintiff, the latter should except thereto, and require further answer to be made, in the manner hereinafter indicated, and upon a refusal of the garnishee to answer more fully, a default may be entered against him.¹

When two answers by the garnishee are shown by the record, whether by a written answer and a supplement thereto, or by a written answer and subsequent answer orally in open court, which has been reduced to writing and filed, the two answers will be considered to be but one answer in law.² A substituted answer may be admitted as a continuation of the original.³

§ 632. Documents appended to the answer.—A garnishee may make the affidavits of disinterested third persons a part and parcel of his own answer whenever he is willing to swear that he believes such affidavits to be true; provided such documents do not go to sustain the claims of third parties to the effects or credits for which the garnishee himself might otherwise be charged, and provided he does not seek thereby to exonerate himself from liability for funds which his answer ad-

money has been received, etc., are not "privileged" within the spirit of the law, and can not be so held without occasioning gross frauds. *Shaughnessy v. Fogg*, 15 La. Ann. 330; *Daigle v. Bird*, 22 La. Ann. 138. Compare *White v. Boyd*, 20 La. Ann. 188.

A written answer filed without excuse by a garnishee who has been cited to appear for personal examination may be stricken from the files. *Penn v. Phelan*, 52 Iowa 535.

A wife of one of several principal defendants, when she has been summoned as a garnishee, may properly be excused from answering material questions touching her real estate, sought to be subjected by the suit. *Claremont Bank v. Clark*, 46 N. H. 134.

Where a plaintiff makes himself a

garnishee there is no necessity for either a summons, *scire facias*, interrogatories, or any other coercive process. *Graighle v. Notnagle*, Pet. Cir. Ct. 245.

1. *Richardson v. White*, 19 Ark. 241; *Jemison v. Scarborough*, 56 Tex. 358; as to "Default," see *post*, § 683; as to proceedings when disclosures unsatisfactory, see *post*, § 651.

In Illinois a default for want of answer to interrogatories is only a judgment *nisi* and the issue of a *scire facias* is an indispensable prerequisite to the entry of final judgment against him. *Williams v. Vanmetre*, 19 Ill. 293.

2. *Meadowcroft v. Agnew*, 89 Ill. 469; *Easton v. Lowery*, 29 Ala. 454.

3. *Stockton v. Burlington*, 4 Greene (Iowa) 84.

mits he has received.¹ Likewise a letter may be included when it goes to sustain or explain the statements in the garnishee's disclosure.² It is within the discretion of the court to determine the authenticity, pertinancy and admissibility of such papers, and the court is not limited therein as to the time when such discretion may be exercised, so long as the disclosure continues under the control of such court.³

An order of the court was granted in Wisconsin making a copy of the contract, between the garnishee and defendant, which was set up in the garnishee's answer and furnished by the plaintiff, a part of the evidence in the case.⁴

By obtaining an order of court therefor, the testimony of the principal debtor in the garnishment proceeding may be taken and annexed to or filed with the answer of the garnishee to be considered by the court in connection therewith on an issue as to the title of property.⁵

§ 633. **Amendment of the answer.**—It is within the sound discretion of the court to permit a garnishee, who has filed an answer which he thereafter honestly desires to amend because of an honest mistake or subsequently acquired knowledge, to correct his answer in that regard. If the garnishee has committed a mistake or fallen into error which could not reasonably have been avoided, he should be permitted to amend his answer

1. *Chase v. Bradley*, 17 Me. 89; *Kelly v. Bowman*, 12 Pick. (Mass.) 383; *Holden v. Brown*, 19 N. H. 163; *Bell v. Jones*, 17 N. H. 307; *Giddings v. Coleman*, 12 N. H. 153.

In one case the affidavit of a person interested in the cause was permitted to be made a part of the answer. *Kelly v. Bowman*, 12 Pick. (Mass.) 383. But this was certainly bad practice. Such a witness should be submitted to cross-examination.

2. *Willard v. Sturtevant*, 7 Pick. (Mass.) 194.

3. *Bell v. Jones*, 17 N. H. 307.

4. *Lusk v. Galloway*, 52 Wis. 164.

5. *Amoskeag Mfg. Co. v. Gibbs*, 28 N. H. (8 Fost.) 316.

But such testimony was not permitted to be laid before the jury. *Amoskeag Mfg. Co. v. Gibbs*, 28 N. H. (8 Fost.) 316.

Annexing the testimony of the defendant in this way to the answer does not affect or include the taking of his deposition to be used in the trial of an issue.

The affidavit of the defendant can not be annexed to the answer, for he is an interested witness and must submit to cross-examination.

any time before final judgment,¹ even after the plaintiff has filed allegations of facts not stated in the original answer,² and even after an issue has been tried between the plaintiff and one to whom the debt is supposed to be transferred.³ An amendment should certainly be allowed where the garnishee is a corporation and has answered by an agent, who has thereafter ascertained material facts affecting the liability, or where he has ascertained that material facts have occurred subsequent to his answer.⁴ In Michigan it is said that a garnishee, who has admitted an indebtedness, has a right to make further and supplemental disclosure.⁵ Where also one has answered admitting an indebtedness to a firm which was supposed to be composed of the defendants, he should be allowed to file a second answer

1. *Smith v. Brown*, 5 Cal. 118; *Tapp v. Green*, 22 La. Ann. 42; *Rose v. Whaley*, 14 La. Ann. 374; *Hennen v. Forget*, 27 La. Ann. 381; *Sebor v. Armstrong*, 4 Mass. 206; *Parker v. Danforth*, 16 Mass. 299; *Shaw v. Bunker*, 2 Metc. (Mass.) 376; *Hovey v. Crane*, 12 Pick. (Mass.) 167; *Drake v. Lake Shore & M. S. Ry. Co.*, 69 Mich. 168, 37 N. W. Rep. 70; *Milliken v. Mannheimer*, 49 Minn. 521, 52 N. W. Rep. 139; *Tracy v. McGarty*, 12 R. I. 168; *Murrell v. Johnson*, 3 Hill L. (S. Car.) 12; *Simon v. Ash*, 1 Tex. Civ. App. 202, 20 S. W. Rep. 719.

2. *Collins v. Smith*, 12 Gray (Mass.) 431.

3. *Buford v. Melborn*, 6 Ala. 818.

Where the garnishee can not be truly said to have refused or neglected to answer, although the exceptions of the plaintiff for lack of sufficiently full and specific answer, when the time for answering has expired, the plaintiff is not necessarily entitled to judgment; for the garnishee may ask, and the court may grant him leave, to file an amended answer at a later date. *Simon v. Ash*, 1 Tex. Civ. App. 202, 20 S. W. Rep. 719.

On the day fixed for hearing, the

garnishee may obtain leave to file an amended answer, where the plaintiffs have taken a rule on the plaintiff to show cause why his answer should not be taken as confessed. *Rose v. Whaley*, 14 La. Ann. 374; *Drake v. Lake Shore & M. S. R. Co.*, 69 Mich. 168.

In Michigan a garnishee was permitted, in the circuit court, to correct a mistake in an answer under oath which he had made on his oral examination before a justice. *Newell v. Blair*, 7 Mich. 103. But the case was being tried *de novo*.

A garnishee who has answered without knowledge of a *bona fide* assignment made before the service of process, may obtain permission to modify his answer. *Tracy v. McGarty*, 12 R. I. 168.

For if he do not so modify his answer he will not be protected from such assignee by satisfying the judgment which will be entered against him in the garnishment proceeding. *Lewis v. Dunlop*, 57 Miss. 130.

4. *Crerar v. Milwaukee, etc.*, R. R. Co., 35 Wis. 67.

5. *Drake v. Lake Shore & M. S. R. Co.*, 69 Mich. 168, 37 N. W. Rep. 70.

when he discovers that the firm to which he is indebted is not identical with the one which he has named,¹ and no further interrogatories are necessary to allow the amendment of an answer when the garnishee discovers that he has stated facts incorrectly or in terms admitting inferences or implications which he has not intended.²

Amendments should be by the court guarded with great care, especially where such amendment materially changes the liability of the garnishee. An amendment was denied to a manifestly evasive answer in Louisiana because it was said the practice might lead to frivolous delays.³ And also where the answer to interrogatories acknowledge an indebtedness and the garnishee thereafter sought to show that he had been released from any judgment in the suit.⁴ And in Mississippi, where the garnishee answered admitting an indebtedness, and thereafter amended his answer, alleging a transfer prior to the garnishment, which transfer he stated in his first answer he *heard* had been made, judgment was rendered against him notwithstanding the amendment.⁵

A court of review will, however, it seems, interfere where there has been a gross abuse of legal discretion in the court below.⁶

The court may, in its discretion, refuse to permit an amendment of an answer when he thinks the disclosure already made is sufficient to entitle the garnishee to be discharged.⁷ In fact it is within the court's discretion to refuse to allow an amended and additional answer in any case.⁸

1. *Ullman v. Eggert*, 30 Ill. App. 310.

2. *Carrique v. Sidebottom*, 3 Metc. (Mass.) 297.

3. *Davis v. Oakford*, 11 La. Ann. 379; *Rose v. Whaley*, 14 La. Ann. 374; *Tapp v. Green*, 22 La. Ann. 42.

But it is within the discretion of the court in Louisiana to allow an amendment. *Rose v. Whaley*, 14 La. Ann. 374.

4. *Thomas v. Fuller*, 26 La. Ann. 625.

5. *Pollard v. Mobile Savings Bank*, 60 Miss. 946.

6. *Smith v. Brown*, 5 Cal. 118.

7. *Milliken v. Mannheimer*, 49 Minn. 521, 52 N. W. Rep. 139.

8. *Soule v. Kennebec Maine Ice Co.*, 85 Me. 166, 27 Atl. Rep. 92.

A garnishee has no right to make an amended disclosure while an exception is pending to the rule of the court charging him. *American Buttonhole, etc., Co. v. Burgess*, 75 Me. 52.

In Tennessee it has been said that since the answer of the garnishee is conclusive, the court may compel an amended answer where the first answer is imperfect.¹

§ 634. Interpretation of the answer—(a) **Construed most strongly against the garnishee.**—The garnishee's answer is the evidence on which the plaintiff's judgment against the garnishee must be founded. It is evidence on the part of the plaintiff, and is, in fact, the plaintiff's only evidence against the garnishee. It is also the only evidence on which the garnishee's case is founded; therefore, to support a judgment for the plaintiff, it should show unmistakably by its terms that the garnishee is indebted to the principal defendant; or, to warrant a judgment discharging the garnishee, it should show to a certainty that the garnishee is not indebted to the principal defendant. It is then necessary that the court should, before entering judgment in the garnishment proceedings, interpret the answer and arrive at its unmistakable meaning. Because of this, the answer should contain positive statements relating to his liability to the defendant, as hereinbefore shown.² If the garnishee has not positive knowledge, he may apply to the court to grant him time to obtain knowledge of the facts of which he was doubtful. The court will interpret the answer according to its terms. The garnishee has it in his power to make a positive statement, either of his own knowledge or on information and belief; and that the garnishee may be impelled to make the clearest possible statement of the facts regarding his contract relationship with the principal defendant, the court will make no presumption in his favor, but will construe the terms of the answer most strongly against the garnishee when such answer is evasive, uncertain, or ambiguous.³ But it will not carry this policy to

1. *Moore v. Green*, 4 Humph. Aiken, 3 Pick. (Mass.) 1, 4; *Clark v. Brown*, 14 Mass. 271; *Cleveland v.*

2. *Ante*, §§ 622-631.

3. *Crain v. Gould*, 46 Ill. 293; *Brainard v. Shannon*, 60 Me. 342; *Matthews v. Dare*, 20 Md. 248; *Kelly v. Bowman*, 12 Pick. (Mass.) 383; *Harris v.*

Clap, 5 Mass. 201; *Sebor v. Armstrong*, 4 Mass. 206; *Ripley v. Severance*, 6 Pick. (Mass.) 474; *Scott v. Ray*, 18 Pick. (Mass.) 360; *Ormsbee v. Davis*, 5 R. I. 442.

the extent of contradicting the plain meaning of the language used.¹

An answer admitting property in the hands of the garnishee belonging to the defendant but containing doubtful and indefinite statements as to the quantity and value of it, will warrant a judgment against the garnishee, unless his disclosure clearly shows him entitled to be discharged. It is his business to keep an exact account with his creditor, and he is presumed to know the condition thereof.² Where a garnishee answered merely "that he had in his possession a sum of money belonging to the defendant in attachment, but which he was informed by him was paid over to another person, but that person had given no notice of any claim to it," the answer was said to be sufficient to charge the garnishee.³ A garnishee's answer, admitting in effect that he had in his possession funds belonging to the defendant, he refusing upon special interrogatories to state the amount, will warrant a judgment against him, and *that* in an amount sufficient to satisfy the plaintiff's demand.⁴ A showing that the garnishee was indebted to the principal defendant on the evening of the day previous to that on which the process was served upon him, will raise the presumption that he was indebted at the time of service, and will warrant a judgment against him.⁵ An answer by an attorney who had been a garnishee, on a suit against his client, admitting that money had been deposited by him, but alleged it was so deposited to secure him for service rendered and to be rendered, sustained a judgment against him, the court saying that it would be a fraud upon creditors to allow a debtor thus to pledge his property for the payment of contingent liabilities.⁶ A garnishee who had informed the plaintiff before suit that he had enough in his hands to pay the demand, and who had then paid a part of it, was afterwards held liable in garnishment to pay the whole where he put in an evasive answer.⁷ It

1. *Sampson v. Hyde*, 16 N. H. 492.

2. *Whitney v. Kelley*, 67 Me. 377.

3. *Baker v. Moody*, 1 Ala. 315.

4. *Gaty v. Franklin Ins. Co.*, 12 La. (Ky.) 362.

Ann. 272.

5. *Hoops v. Culbertson*, 17 Iowa 305.

6. *Crain v. Gould*, 46 Ill. 293.

7. *Keel v. Ogden*, 5 T. B. Mon.

has been said in California that when it is evident the garnishee is acting in bad faith in denying his indebtedness, or by asserting a claim himself, his answer may be regarded as fraudulent.¹ And in Texas, where a garnishee answered that he was "not indebted to either of the debtors and did not know any one who was," judgment against him in the trial court was supported by the supreme court.² On the contrary a bank as garnishee, answering that it owed the debtor nothing at the time it was served with process, and stating that he owed it and still owes it a certain sum; that he owns sixty shares of stock in the bank at the time of service, but the stock was and still is pledged to a third person for its full value, and that the debtor had no interest in the bank at the time of service, nor at the time of answer, except the stock mentioned, did not warrant a judgment against the garnishee, although the answer did not state specifically that he did not owe the principal defendant at the time of the answer, nor that he did not then own stock in the bank. There was no willful failure or refusal to make a full answer.³

§ 635. (b) Will be considered as a whole.—In interpreting the answer of the garnishee, the court will consider the natural import of the language of the answer and be controlled by it. The garnishee is to be charged or not, according to the evidence offered by the whole of the answer, and no part of it can be excluded merely because it is not positive or is stated upon information and belief.⁴ The garnishee will be charged or discharged according to the preponderance of the evidence offered by the whole of the answer, for the answer is the evidence which must support the judgment, and it is for the plaintiff to prove, by the answer, the allegations of his affidavit and not for the garnishee to disprove them.⁵

1. *Parker v. Page*, 38 Cal. 522.

2. *Melton v. Lewis*, 74 Tex. 411, 12 S. W. Rep. 93.

3. *First Nat. Bank v. Robertson*, 3 Tex. Civ. App. 150 22 S. W. Rep. 100.

4. *Cardany v. N. E. Furniture Co.*,

107 Mass. 116; *Porter v. Stevens*, 9 Cush. (Mass.) 530; *Sexton v. Amos*, 39 Mich. 695.

5. *Cardany v. N. E. Furniture Co.*, 107 Mass. 116.

§ 636. (c) **Will be accepted as true.**—In construing the answer, the court will accept its statements as true, until it is traversed and conclusively shown to be untrue. Whether it contains a denial of an affirmation of new matter, it will be accepted as proof until it is overthrown by evidence, and the rights of the parties will be determined by its statements. It will not be deemed to be untrue merely because it is not sufficiently full, or because its statements may be open to some suspicion.¹

The rule regarding the conclusiveness of the answer applies only as to the statement of facts which are relevant to the issue and directly concern the garnishee's liability. When he sets up rights or draws conclusions resulting from, or arising out of, the facts stated, such rights or conclusions are subject to the inspection or revision of the court.² And the plaintiff may

1. *Hamilton v. Hill*, 86 Me. 137, 29 Atl. Rep. 956; *Robinson v. Rapelye*, 2 Stew. (Ala.) 86; *Meadowcroft v. Agnew*, 89 Ill. 469; *Rankin v. Simonds*, 27 Ill. 352; *Pierce v. Carleton*, 12 Ill. 358; *Manowsky v. Conroy*, 33 Ill. App. 141; *Chicago & E. I. R. R. Co. v. Blagden*, 33 Ill. App. 254; *Meeker v. Sanders*, 6 Iowa 61; *Cairo, etc., R. R. Co. v. Killenberg*, 82 Ill. 295; *Wilder v. Shea*, 13 Bush (Ky.) 128; *Helme v. Pollard*, 14 La. Ann. 306; *Barnes v. Wayland*, 14 La. Ann. 791; *Coleman v. Fenimore*, 16 La. Ann. 253; *Henry v. Bew*, 43 La. Ann. 476, 9 So. Rep. 101; *Stedman v. Vickery*, 42 Me. 132; *Plummer v. Rundlett*, 42 Me. 365; *Fay v. Sears*, 111 Mass. 154; *Forseth v. Shaw*, 10 Mass. 253; *Hatch v. Smith*, 5 Mass. 42, 49; *Whitman v. Hunt*, 4 Mass. 272; *Sexton v. Amos*, 39 Mich. 695; *Davis v. Knapp*, 8 Mo. 657; *Ronan v. Dewes*, 17 Mo. App. 306; *Reinhart v. Empire Soap Co.*, 33 Mo. App. 24; *Sise v. Drew*, 18 N. H. 409; *Burnham v. Dunn*, 35 N. H. 556.

The garnishee will be discharged unless the answer clearly shows that he should be charged. *Robinson v.*

Rapelye, 2 Stew. (Ala.) 86. As to the "Effect of the Answer," see *post*, § 638.

But where it first admits an indebtedness, he will be charged unless he himself shows clearly that he should be discharged. *Giddings v. Coleman*, 12 N. H. 153.

And if he deny an indebtedness and state circumstances and facts which show an indebtedness, he will be charged. *Perine v. George*, 5 Ala. 641.

A replication filed by the plaintiff, stating that the matters contained in the answer "are wholly—except so far as respondent charges himself with" a particular fund which is mentioned, is not a sufficient traverse and the answer will stand admitted. The court can not supply the omission of the word "false" or "untrue," by intendment, although the intent of the pleader to deny the answer is obvious. *Truitt v. Griffin*, 61 Ill. 26.

2. *Lamb v. Franklin Man. Co.*, 18 Me. 187; *Plummer v. Rundlett*, 42 Me. 365.

allege and prove other facts, not stated or denied by the person served as trustee, which may be material to the case; and such proof will be considered in deciding the issue upon an examination of all the evidence.¹ But neither party can allege and prove any other facts except such as are neither alleged or denied by the garnishee.²

The rule which accepts the answer as a statement of the truth does not exclude the application of the ordinary rule regarding the necessity for a preponderance of evidence on which to support a judgment.³

§ 637. (d) **Default interpreted as an admission of indebtedness.**—When a garnishee fails to answer within the time allowed him for that purpose his neglect so to do is interpreted to be an admission of his liability to the defendant, and on this interpretation a judgment (final or conditional according to the local procedure of the state) will be entered against him.⁴ His default is an admission, or *quasi* admission, of his liability. Whenever it is considered to be an admission he is estopped thereafter from interposing a defense. When it is only a *quasi* admission, no final judgment can be entered against him until he is in some manner notified of such default and given an opportunity to defend.⁵

In Pennsylvania on default of answer the plaintiff is entitled to a rule on the garnishee to answer, and this rule is one of right.⁶ In Illinois filing interrogatories and giving time and opportunity for the garnishee to answer them, or the taking of a conditional default, and having a *scire facias* to issue against the garnishee, is an indispensable prerequisite to

1. Fletcher v. Clarke, 29 Me. 485.

Freeman v. Miller, 51 Tex. 443; Harmon v. Harwood, 35 Vt. 211.

2. Gouch v. Tolman, 10 Cush. (Mass.) 104.

5. A default entered before the expiration of the time given in which the garnishee may file his answer will be set aside on motion or reversed on error. Randolph v. Peck, 4 Ala. 389.

3. Kelley v. Weymouth, 68 Me. 197. Further as to proceedings when answer unsatisfactory, see *post*, § 651.

4. Whiteside v. Tunstall, 17 Ill. 258; Sturges v. Kendall, 2 La. Ann. 565;

Henry v. Bryce, 11 La. Ann. 691; Eddy v. Providence M. Co., 15 R. I. 7;

6. Dougherty v. Thayer, 73 Pa. St. 172.

obtaining a final judgment against him.¹ But if he is defaulted for want of a sufficient answer and neglects to appear, relying upon the sufficiency of his answer, judgment will be entered against him, and he can not thereafter procure a review on a writ of *certiorari*.² Likewise in Iowa, no final judgment will be entered against the garnishee until he has had an opportunity to show cause why an execution should not issue against him.³ But he is not entitled to such privilege where, after a default has been set aside, he suffers a second default to be entered against him.⁴

A default is proper also where a garnishee, instead of answering interrogatories propounded, makes a general denial of his indebtedness. Further it is not necessary for the commissioner appointed to take such interrogatories, to certify that the garnishee has failed to answer as required.⁵

No default can be entered, however, where the plaintiffs have consented to a continuance pending a motion to quash the writ.⁶ Further, where the garnishee is present, at the time set for him to show cause, and the plaintiff does not appear, the garnishment proceedings are ended and the subsequent appearance of both plaintiff and garnishee can not affect the rights acquired by third persons, even though such third person claim as an assignee of the principal defendant on the same day the writ of garnishment issued.⁷ On the same principle where a garnishee appears on the day he should make answer, and the plaintiff declines or is not prepared to take the answer, the garnishment writ will be dismissed and the garnishee discharged from liability to answer.⁸ Again, where

1. *Williams v. Vanmetre*, 19 Ill. 293; *Michigan, etc., R. R. Co. v. Keohane*, 31 Ill. 144; *Rielly v. Prince*, 37 Ill. App. 102.

2. *Rielly v. Prince*, 37 Ill. App. 102.

3. *McDonald v. Finney*, 87 Iowa 529, 54 N. W. Rep. 476.

4. In Texas judgment by default can not be entered against the garnishee in another county without a commission first issuing to get an-

swers in the county of his residence to interrogatories. *Cohn v. Tillman*, 66 Tex. 98, 18 S. W. Rep. 111.

5. *Selman v. Orr*, 75 Tex. 528, 12 S. W. Rep. 697.

6. *Lafin & Rand Powder Co. v. Baltimore and Ohio R. R. Co.*, 63 Md. 76.

7. *Johnson v. Dexter*, 38 Mich. 695.

8. *Ogden v. Mills*, 3 Cal. 253.

In this case no action was taken

a garnishee appeared in court ready to make his answer, and the time for making such answer was deferred by an arrangement with the plaintiff's attorney, and then in the absence of the garnishee a default was entered, such default was set aside on application therefor.¹

§ 638. **Effect of the answer—(a) Generally.**—The answer is evidence for the plaintiff, and, when uncontradicted, will be deemed to be true, and will determine how far the garnishee is chargeable when such answer appears to be full and true.² Under some statutes the answer has been deemed to be final and could not be controverted on the ground that a plaintiff could not impeach his own testimony, but the more recent statutes are permitting it to be contradicted and modified in the manner hereinafter shown.³ It is *prima facie* evidence of the truth of the facts stated within it, as between the parties to the suit. In any event it is taken as full proof until it is contradicted by other evidence, and such judgment may be rendered thereon as is proper upon the statement of facts which it contains.⁴

Under the old garnishment law the answer was conclusive proof and could not be contradicted.⁵ But under the newer garnishment law it is taken as *prima facie* evidence of the matters contained and between the parties to the suit. It may be

until a term had elapsed, the expiration of which term barred the plaintiff from further action.

1. Hueskamp v. Van Leuven, 56 Iowa 653.

2. Hamilton v. Hill, 86 Me. 137, 29 Atl. Rep. 956; *ante*, § 634.

3. *Post*, § 651.

4. Illinois Central R. R. Co. v. Cobb, 48 Ill. 402; Flash v. Norris, 27 La. Ann. 93; Helme v. Pollard, 14 La. Ann. 306; McDowell v. Crook, 10 La. Ann. 31; Bartlett v. Wilbur, 53 Md. 485; Hawes v. Langton, 8 Pick. (Mass.) 67; Kelly v. Bowman, 12 Pick. (Mass.)

383, 386; Stackpole v. Newman, 4 Mass. 85; Barker v. Taber, 4 Mass. 81; Vanderhoof v. Holloway, 41 Minn. 498, 43 N. W. Rep. 331; Chase v. North, 4 Minn. 381; Williams v. Jones, 42 Miss. 270; Davis v. Knapp, 8 Mo. 657; Raymond v. Narragansett Tinware Co., 14 R. I. 310; McGraw v. Memphis & O. R. R. Co., 5 Coldw. (Tenn.) 434; Brown v. Slate, 7 Humph. (Tenn.) 112; Perea v. Colo. Nat. Bank, (N. Mex.) 27 Pac. Rep. 322.

5. Cole v. Sater, 5 Minn. 468; Hawes v. Langton, 8 Pick. (Mass.) 67; Hackley v. Kanitz, 39 Mich. 398.

contradicted in the manner provided by statute, and the truth of the answer becomes a question of fact for the jury.¹

Where there are several answers, each garnishee is to be held liable or discharged on the facts disclosed in his own answer alone. The facts stated in the answer of another can not be construed as evidence against *one*.² A garnishee's own answer is the only evidence that can be introduced in the proceeding against him,³ except when an issue is raised on an insufficient answer.⁴

Only evidence between the parties to the suit.—The rule relating to the effect of the garnishee's answer as evidence and the conclusiveness thereof relates only to questions arising between the parties to the garnishment proceeding.⁵ It is not evidence against a stranger to the proceedings;⁶ nor is it evidence even against an intervener claiming to be an assignee of the defendant.⁷

It must be remembered, however, that the statutory answer of a garnishee will have no effect whatever, unless judgment against the defendant is entered in the main action, for the garnishment is an ancillary proceeding and can not stand alone.⁸

§ 639. (b) **Does not of itself discharge garnishee.**—A garnishee who filed an answer in a garnishment proceeding is thereafter considered as continuing before the court for the purpose of receiving its judgment.⁹ But he is entitled to a discharge if no judgment is entered against him.¹⁰

1. *Perea v. Colo. Nat. Bank*, — N. Mex. —, 27 Pac. Rep. 322; *Mason v. McCampbell*, 2 Ark. 506; *post*, § 651.

2. *Moore v. Green*, 4 Humph. (Tenn.) 299; *Rundlet v. Jordan*, 3 Me. 47.

3. *Hackley v. Kanitz*, 39 Mich. 398.

4. *Post*, § 651.

5. *Pitts v. Mower*, 18 Me. 361; *McClellan v. Young*, 17 Ala. 498; *Bassett v. Garthwaite*, 22 Tex. 230.

6. *McClellan v. Young*, 17 Ala. 498.

7. *Bassett v. Garthwaite*, 22 Tex. 230.

8. *Frisk v. Reigelman*, 75 Wis. 499, 43 N. W. Rep. 1117; *ante*, §§ 3, 487 and 613.

9. *Lockhart v. Johnson*, 9 Ala. 223. Even though it denies all liability to the defendant. *American Distributing Co. v. Distilling, etc., Co.*, 24 Civ. Proc. Rep. 245, 33 N. Y. S. 546.

10. *Cheatham v. Trotter, Peck* (Tenn.) 198.

Furthermore, although a garnishee is discharged by the trial court, a removal of the cause to a court of review will continue him as a party to the proceeding, and he will be bound accordingly.¹ In an oral case in Massachusetts the court of common pleas discharged a garnishee after he had answered. The cause was removed to the supreme court and the discharge was held to be void, the court saying that the garnishee must follow the cause into the supreme court, and, if required, must there answer interrogatories.² In Michigan this is controlled by statute, and although a judgment is entered in favor of the defendant, the garnishee is not thereby released if an appeal is taken from the proceedings because "no final determination" has been reached.³

§ 640. (c) **Admission of indebtedness will warrant a judgment for the plaintiff.**—When the answer of the garnishee admits a legal indebtedness to the defendant, or the possession of property belonging to him, the answer will entitle the plaintiff to a judgment against the garnishee, and, if the judgment has been entered against the principal defendant, will entitle the plaintiff to appropriate the fund or property to the satisfaction of his demand. The admission that there are credits or effects in his hands is equivalent to a tender of them, to answer the purpose of the process; and the plaintiff may take judgment accordingly. But if the fund be not payable, or the defendant not entitled to the possession of the property, no final judgment can be entered and execution issued until it is so payable or deliverable. But judgment may, in some states, be rendered against him with a stay of execution until the maturity of the demand.⁴

1. *Lehman v. Hudmon*, 85 Ala. 135, 4 So. Rep. 741; *Boynton v. Foster*, 7 Metc. (Mass.) 415.

Where garnishee filed a written answer in a justice's court and failed to appear and claim his privilege of filing a new answer in the circuit court, he was not allowed to object that the cause was tried without a continuance

to enable him to make a proper answer. *Lehman v. Hudmon*, 85 Ala. 135, 4 So. Rep. 741.

2. *Boynton v. Foster*, 7 Metc. (Mass.) 415.

3. *Erickson v. Duluth, S. S. & A. Ry. Co.*, — Mich. —, 63 N. W. Rep. 420.

4. *Mims v. Parker*, 1 Ala. 421; *Cottrell v. Varnum*, 5 Ala. 229; *McKee v.*

When the garnishee has admitted an indebtedness, he will be charged, unless he shows himself clearly entitled to be discharged. Having once admitted his liability the burden rests upon him to show the contrary.¹ It has been said that he must show this by evidence of as high a nature as that in his disclosure of facts known to himself.² It has been still further said that where he has made a full disclosure, and the facts which he has stated clearly show his liability, his denial of indebtedness thereafter will be immaterial and unavailing.³

When the answer of the garnishee admits that he had property in his hands belonging to the defendant at the time of the service of process, but that he held it as a pledge to secure a demand which he had against the defendant, judgment can only be entered against him for the difference between the value of such property, if sold, and his demand against the defendant.⁴ But if the property was stated to be a note for a sum larger than the debt, and the garnishee state that he has sold the note for the amount of his demand, he will nevertheless be chargeable for the remainder, unless he state that the sale was made in good faith and for a fair price.⁵

An answer of a garnishee who admits an interest to the defendant, in which indebtedness another person has an interest, and that person is brought into the suit in the manner provided by the statute, and makes default, the garnishee's answer

Anderson, 35 Ind. 17; Weymouth v. Penobscot Log-Driving Co., 75 Me. 41; Dolby v. Tingley, 9 Neb. 412; Newlin v. Scott, 26 Pa. St. 102; Simmons v. Carmichael, (Tex. Civ. App.) 28 S.W. Rep. 690.

1. Scott v. Ray, 18 Pick. (Mass.) 360; Fogg v. Worster, 49 N. H. 503; Giddings v. Coleman, 12 N. H. 153.

2. Giddings v. Coleman, 12 N. H. 153.

3. Milliken v. Mannheimer, 49 Minn. 521, 52 N. W. Rep. 139.

There should be no judgment entered against a garnishee when there is reason to believe that he may be

compelled to pay the same demand to another party. Pierce v. Carleton, 12 Ill. 364.

Therefore, where an answer shows that the garnishee has become indebted upon negotiable paper, and that he does not know in whose hands the paper now is, he should be discharged; but where his answer shows that the paper had not been assigned before garnishment, he may be charged. Daniel v. Rawlings, 6 Humph. (Tenn.) 403; ante, §§ 567-569.

4. Peaselee v. Doane, 39 N. H. 463; ante, § 585.

5. Peaselee v. Doane, 39 N. H. 463.

will not then warrant a judgment for the plaintiff, unless it admitted such an indebtedness as would sustain an action of debt or *indebitatus assumpsit*.¹

To support a judgment for the plaintiff, the answer of the garnishee must admit a *legal* indebtedness, for only such can be reached by process of garnishment.² Where, therefore, the only claim which the garnishee owes to the principal defendant is the price of intoxicating liquors purchased in another state for the purpose of illegal sale in this state, the garnishee will be discharged.³

§ 641. (d) Denial of indebtedness will defeat recovery by the plaintiff.—If the answer of the garnishee deny that at the time of service of process upon him he was indebted to the defendant, and deny that he then had property in his hands belonging to the defendant, such answer will not support a judgment for the plaintiff. If the plaintiff does not file interrogatories, or take steps to have a supplemental answer filed or an issue tried upon the answer, no judgment can be entered in his favor and the garnishee will be entitled to be discharged, unless such allegation in the answer is overthrown by statements in itself elsewhere contained. In the absence of fraud there is no ground for charging him as a garnishee.⁴ But if the garnishee's denial of indebtedness be overthrown by statements in another part of his answer of circumstances and facts which show an indebtedness, he may be held liable on his answer.⁵

1. *Mobile, etc., R. R. Co. v. Whitney*, 39 Ala. 468; *ante*, § 482.

2. *Ante*, §§ 475 and 482.

3. *McGlinchy v. Winchell*, 63 Me. 31; *ante*, § 28.

4. *Buford v. Welborn*, 6 Ala. 818; *Hartman v. Olvera*, 51 Cal. 501; *Denver, T. & Ft. W. R. Co. v. Smeeton*, 2 Col. App. 126, 29 Pac. Rep. 815; *Laschear v. White*, 88 Ill. 43; *Rippen v. Schoen*, 92 Ill. 229; *United States v. Langton*, 5 Mason 280; *Farmers', etc., Bank v. Welles*, 23 Minn. 475; *Burnham v. Dunn*, 35 N. H. 556; *Carpenter v. Gay*, 12 R. I. 306; *Baltimore, etc.,*

R. R. Co. v. Gallahue, 12 Gratt. (Va.) 655.

It has been held in Maine that the mere general denial of liability by the garnishee in his answer will not warrant his dismissal, because the answer is merely in the nature of a plea, and, before he can be dismissed, the answer must be sustained by full and satisfactory disclosure in answer to the plaintiff's interrogatories. *Toothaker v. Allen*, 41 Me. 324.

5. *Perine v. George*, 5 Ala. 641; *Cornish v. Russell*, 32 Neb. 397, 49 N. W. Rep. 379.

But where he substantially denies all indebtedness, the fact that his answer is vague and uncertain and inartificially drawn will not render him liable.¹ But doubtful and evasive answers, and deliberate and untruthful denials, will give ground for judgment against the garnishee.² A mere failure on the part of the garnishee to aver in his answer that he was not indebted to the defendant at the time of the service of process, is not of itself sufficient to warrant a judgment against him. Objection to the answer should be made in a formal manner; as for a default, or by proceedings when answer is unsatisfactory.³

When a garnishee's answer shows that he was not indebted to, and had no property of, the defendant at the time of service, he can not be held to answer further touching his future indebtedness.⁴ There must be an existing liability at the time of service, even though such indebtedness is to become payable in the future.⁵

§ 642. (c) Denial of "debt" stops proceedings where no personal service.—The effect of the garnishee's answer when it shows that he is not indebted to the principal defendant, and has no property in his possession belonging to the principal defendant, is to put a stop to further proceedings, not only against the garnishee himself, but, when there has been no personal service upon, or personal appearance by, the principal defendant, to stop further proceedings against him as

1. *Smith v. Bruner*, 23 Miss. 508; *Kiggins v. Woodke*, 78 Iowa 34, 42 N. W. Rep. 576.

A statement in the garnishee's answer that at no time since service had he any "property of the defendant in his hands or under his control as stated by the plaintiff's pleadings or otherwise," is not vague and uncertain, but clearly denies possession of defendant's property. *Kiggins v. Woodke*, (Iowa) 42 N. W. Rep. 576.

2. *Dawson v. Maria*, 15 Oregon 556; *ante*, § 633.

3. *Little v. Nelson*, 61 Miss. 672; *ante*, § 636; *post*, § 651.

Bringing property into court.—It is sometimes provided that upon answering and admitting the possession of property of the defendant, the garnishee may bring such property into court and claim to be discharged with costs. This is controlled by local statute and such practice is not general. *Walker v. Bradley*, 2 Ark. 578.

4. *Jones v. Howell*, 16 Ala. 695.

5. *Ante*, § 480.

well. The court is without jurisdiction to proceed. In all attachments where the defendant is not himself present in person, the court has no jurisdiction over him except to the extent of his property which it holds, and therefore when it holds no debt of other property it has not anything whatever upon which it can base jurisdiction to enter a judgment against him. When therefore the answer of a garnishee entitles him to a dismissal and there has been no personal service or appearance of the defendant, the plaintiff must impeach the truth of the garnishee's answer, or the answer as filed will cause a dismissal both as to the garnishee and the principal defendant, with costs.¹

§ 643. (f) **Showing uncertainty of indebtedness discharge of the garnishee.**—To support a judgment for the plaintiff, a garnishee's answer must show that he had personal property in the defendant in his possession at the time of service of process, or that he was at that time legally indebted to him in a debt which must have been due or to become due absolutely and not depending upon any contingency or affected by existing liens,² and must have been such a debt arising upon contract as would support an action at law,³ either in the form of debt or *indebitatus assumpsit*.⁴ Therefore, an answer free from fraud which, after being construed according to its evident intention, express or implied, leaves it doubtful as to what amount, if any, the garnishee is indebted to the principal defendant; or which shows that his liability depends upon some occurrence which has not yet happened; or to which it is doubtful that it will ever happen; or which shows an uncertainty as to whom the indebtedness is payable, will not make out a *prima facie* case for the plaintiff, and will not warrant a judgment for him against the garnishee; provided such uncer-

1. McGillin v. Claflin, (Cir. Ct.) 52 Fed. Rep. 657; Bratton v. McGlothlen, 20 Ala. 146; Schoppenhast v. Bollman, 21 Ind. 280; Morris v. U. P. Ry. Co., 56 Iowa 135; Rose v. Whaley, 14 La. Ann. 374.

2. Ante, § 476.

3. Ante, § 480.

4. Ante, § 481.

5. Ante, § 475.

6. Ante, § 482.

tainty continue to exist at the time of filing the answer. The answer, if made in good faith, must *clearly* and unqualifiedly admit an indebtedness, or the possession or money or attachable property, belonging to the defendant. The liability of the garnishee will never be presumed, and if there is a reasonable doubt in regard thereto, the court will discharge him.¹

1. *White v. Hobart*, 90 Ala. 368, 7 So. Rep. 807; *Boyd v. Cobbs*, 50 Ala. 82; *Mims v. Parker*, 1 Ala. 421; *Foster v. Walker*, 2 Ala. 177; *Presnoll v. Mabry*, 3 Port. (Ala.) 105; *Smith v. Chapman*, 6 Port. (Ala.) 365; *Allen v. Morgan*, 1 Stew. (Ala.) 9; *King v. Murphy*, 1 *W.* (Ala.) 228; *Lundie v. Bradford*, 26 Ala. 512; *Voorhies v. Denver Hardware Co.*, 4 Colo. App. 428, 36 Pac. Rep. 65; *Union Pacific Ry. Co. v. Gibson*, 15 Colo. 299, 25 Pac. Rep. 300; *King v. Carhart*, 18 Ga. 650; *Bivens v. Harper*, 59 Ill. 21; *Pierce v. Carleton*, 12 Ill. 358; *People v. Johnson*, 14 Ill. 342; *Hibbard v. Everett*, 65 Iowa 372; *Smith v. Clarke*, 9 Iowa 241; *Morse v. Marshall*, 22 Iowa 290; *Church v. Simpson*, 25 Iowa 408; *Smith v. Gower*, 3 Metc. (Ky.) 171; *Roth v. Hotard*, 32 La. Ann. 280; *Estill v. Goodloe*, 6 La. Ann. 122; *Toothaker v. Allen*, 41 Me. 324; *Comstock v. Farnum*, 2 Mass. 96; *Harris v. Aiken*, 3 Pick. (Mass.) 1; *Graves v. Walker*, 21 Pick. (Mass.) 160; *Shearer v. Handy*, 22 Pick. (Mass.) 417; *Driscoll v. Hoyt*, 11 Gray (Mass.) 404; *Spears v. Chapman*, 43 Mich. 541; *Kraft v. Rath*, 45 Mich. 20; *Smith v. Holland*, 81 Mich. 471, 45 N. W. Rep. 1017; *Kiely v. Bertrand*, 67 Mich. 332, 34 N. W. Rep. 674; *Spears v. Chapman*, 43 Mich. 541; *Schafer v. Vizona*, 30 Minn. 387; *McQuarry v. Geyer*, 57 Mo. App. 213; *McEvoy v. Law*, 9 Mo. 48; *Russell v. Clingan*, 33 Miss. 535; *Alleghany Savings Bank v. Meyer*, 59 Pa. St. 361; *Wetherill v. Flanagan*, 2 Miles (Pa.) 243; *Turner v. Armstrong*, 9 Yerg. (Tenn.) 412; *Huff v. Mills*, 7 Yerg. (Tenn.) 42; *Bullard v. Hicks*, 17 Vt. 198; *Wadsworth v. Clark*, 14 Vt. 139; *Mason v. Beebee*, 44 Fed. Rep. 556.
- A line of old cases held that the garnishee would be held liable unless sufficient matter appeared in his answer to discharge him. *Webster v. Gage*, 2 Mass. 503; *Shaw v. Bunker*, 2 Metc. (Mass.) 376; *Winchester v. Titcomb*, 17 Pick. (Mass.) 435; *Patterson v. Buckmaster*, 14 Mass. 144; *Borden v. Sumner*, 4 Pick. (Mass.) 265, 268; *Graves v. Walker*, 21 Pick. (Mass.) 160; *Greenough v. Stevenson*, 5 Mass. 214, 218. But this rule is only to be applied to cases where, upon some part of his answer, which he fails to explain, he appears *prima facie* to have goods, effects or credits of the defendant in his hands. *Shearer v. Handy*, 22 Pick. (Mass.) 417. If the garnishee discloses the fact that he gave a negotiable promissory note, but does not know who holds it or whether it has been assigned, he must be discharged. *Huff v. Mills*, 7 Yerg. (Tenn.) 42.
- A statement that he is "well satisfied" that one of the notes which he gave has been transferred before he was summoned, will prevent a judgment being entered against him as to that note. *King v. Carhart*, 18 Ga. 650.

§ 644. (g) **Showing special contract subjects the plaintiff to its terms.**—The answer of a garnishee which, admitting property or funds in his hands belonging to the principal defendant, shows that the same was placed in his hands as security for some *bona fide* indebtedness or legal obligation on the part of the defendant; or to be applied to the payment of certain indebtedness; or to be distributed among certain persons; or for any other legal purpose indicated by special instructions or special contract existing between the garnishee and the principal defendant; will subject the plaintiff to the terms of such contract, or conditions of such instructions or trust. The plaintiff can recover no more than the surplus which remains after the satisfaction of the lien, or the carrying out of such instructions, or the fulfillment of such trust, which surplus must belong to the principal defendant and be susceptible of being recovered by him in an action at law, *ex contractu*, at the time the garnishee is charged under the garnishment.¹

Can not affect written contract.—The written answer of a garnishee, while in certain senses admitted as truthful and conclusive evidence,² can not be admitted as evidence to contradict, vary or control the effect of a written contract to which the garnishee was a party with the principal debtor.³

§ 645. (h) **Showing joint indebtedness when defendant is sole, and vice versa.**—To warrant a judgment for the plaintiff, the answer of the garnishee must show a liability from him in the identical character or capacity in which he is summoned; and to the defendant in the identical character or capacity in which he is sued. If the garnishee has been summoned in his individual capacity he can not be held on an answer which

1. Hawthorn *v.* Unthank, 52 Iowa 507; Boston Loan & Trust Co. *v.* Organ, 53 Kan. 386, 36 Pac. Rep. 733; Roth *v.* Hotard, 32 La. Ann. 280; O'Brien *v.* Collins, 124 Mass. 98; Giles *v.* Ash, 123 Mass. 353; Sebor *v.* Armstrong, 4 Mass. 206; Richards *v.* Stephenson, 99 Mass. 311; Lane *v.* Felt, 7 Gray (Mass.) 491; Swisher *v.* Fitch, 9 Miss. (1 Smed. & M.) 541; Kaley *v.* Abbot, 14 N. H. 359; Moses *v.* McMullen, 4 Coldw. (Tenn.) 242; *ante*, § 584, 585, 531, 475-482.

2. *Ante*, § 635.

3. Currier *v.* Taylor, 19 N. H. 189.

shows a liability of a firm of which he is only a member;¹ nor where he negatives the separate liability with which he is sought to be charged.² Likewise, if he has been summoned and sought to be charged on a joint liability, he can not be held liable on an answer which discloses an individual indebtedness.³ But if one of joint garnishees admits a joint liability of himself and others to the defendant, and states the joint account between the parties, the answer is *prima facie* sufficient.⁴

Again, an answer of a garnishee in an action against a sole defendant, admitting a liability to him and another person jointly, will not warrant a judgment in favor of the plaintiff.⁵ Nor will an answer admitting a liability to one of two joint defendants entitle the plaintiff to a judgment against the garnishee, unless one of the joint defendants could have recovered in an action against such garnishee.⁶

§ 646. (i) **Effect of answer when proceedings irregular—Waiver.**—As hereinbefore stated,⁷ the appearance and answer of the garnishee can not give the court jurisdiction, because jurisdiction must be obtained by the service prescribed by the statute; but where jurisdiction has been acquired over the subject-matter of the garnishment by a substantial compliance with the requirements of the statute, then an appearance and

1. *Atkins v. Prescott*, 10 N. H. 120; *Bean v. Barney*, 10 Iowa 498.

2. *Wellover v. Soule*, 30 Mich. 481.

3. *Ford v. Dry Dock Co.*, 50 Mich. 358.

4. *Hennessey v. Farrell*, 4 Cush. (Mass.) 267; *Pollock v. Jones*, 96 Ala. 492, 11 So. Rep. 529.

For if the plaintiff be dissatisfied therewith and desire the answer of the other joint defendants, he can move the court for an order requiring the others to make a disclosure. *Hennessey v. Farrell*, 4 Cush. (Mass.) 267.

If one of two joint garnishees files an answer regarding the joint liability, and the other answers regarding his separate liability, the latter may be

rejected if the former embrace all that was required. *Wharton v. Chipman*, 15 Ind. 434.

5. *Stillings v. Young*, 161 Mass. 287, 37 N. E. Rep. 175; *Hawes v. Waltham*, 18 Pick. (Mass.) 451; *Singer v. Townsend*, 53 Wis. 126.

6. *Thompson v. Taylor*, 13 Me. 420; *Gould v. Meyer*, 36 Ala. 565.

In an action against *two* defendants, an answer admitting a liability "to the defendant," which also shows to which defendant he is indebted, will warrant a judgment against him for his indebtedness to such defendant. *Gould v. Meyer*, 36 Ala. 565.

7. *Ante*, § 610.

answer by the garnishee will waive any informalities or irregularities in the proceeding which are not in themselves jurisdictional defects.¹

1. *Smith v. Chapman*, 6 Port. (Ala.) 365; *Gould v. Meyer*, 36 Ala. 565; *Ahrens & Ott Mfg. Co. v. Patton Sash, Door and Building Co.*, 94 Ga. 247, 21 S. E. Rep. 523; *Raymond v. Rockland Co.*, 40 Conn. 401; *Stevens v. Dillman*, 86 Ill. 233; *Truitt v. Griffin*, 61 Ill. 26; *National Bank v. Titworth*, 73 Ill. 591; *American Exchange Nat. Bank v. Moxley*, 50 Ill. App. 314; *Harris v. Somerset, etc., Ry. Co.*, 47 47 Me. 298; *Houston v. Wolcott*, 1 Iowa 86; *Keppel v. Moore*, 66 Mich. 292, 33 N. W. Rep. 499; *Aultman, Miller & Co. v. Markley*, (Minn.) 63 N. W. Rep. 1078; *Gates v. Tusten*, 89 Mo. 13, 14 S. W. Rep. 827; *Connor v. Pope*, 18 Mo. App. 86; *Erwin v. Heath*, 50 Miss. 795; *Grissom v. Reynolds*, 1 How. (Miss.) 570; *Smith v. Conard*, 23 Ore. 206, 31 Pac. Rep. 398; *Poor v. Colburn*, 57 Pa. St. 415; *Woodfolk v. Whitworth*, 5 Coldw. (Tenn.) 561; *Moody v. Alter*, 12 Heisk. (Tenn.) 142; *Pulliam v. Aler*, 15 Gratt. (Va.) 54; *Joseph v. Pyle*, 2 W. Va. 449; *McCormick Harvesting Mach. Co. v. James*, 84 Wis. 600, 54 N. W. Rep. 1088.

The answer will waive irregularities in the summons or notice. *Moody v. Alter*, 12 Heisk. (Tenn.) 142; *Houston v. Walcott*, 1 Iowa 86.

It will waive a defect in the statement of the return day. *Pulliam v. Aler*, 15 Gratt. (Va.) 54.

It will waive slight irregularities in

the service (*Truitt v. Griffin*, 61 Ill. 26), but appearance in answer to *scire facias* will not waive a defect in the original service. *Raymond v. Rockland Co.*, 40 Conn. 401.

It will not waive the necessity of the bond prescribed by the statutes. *Grissom v. Reynolds*, 1 How. (Miss.) 570.

It will not cure an insufficient return. *Connor v. Pope*, 18 Mo. App. 86; *Gates v. Tusten*, 89 Mo. 13, 14 S. W. Rep. 827.

Neither will it give the court jurisdiction where the writ has not issued in accordance with the statute. Nor where the service is only a mere attempt to make an attachment. *Woodfolk v. Whitworth*, 5 Coldw. (Tenn.) 561.

Contra.—It has been said in Texas that where no rights of third persons intervene, the acceptance of service or voluntary appearance by answer will be sufficient. *Freeman v. Miller*, 51 Tex. 443.

And in Maryland a garnishee has been permitted to confess judgment. *Cockey v. Leister*, 12 Md. 124. But these cases do not go to the extent of saying that the appearance of the garnishee will give jurisdiction over the defendant's property. They only go to the extent of relieving the garnishee by placing himself within the jurisdiction of the court.

CHAPTER XXIX.

PROCEEDINGS WHEN ANSWER WANTING OR UNSATISFACTORY.

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| <p>§ 647. When garnishee fails to answer. (a) Generally.</p> <p>648. (b) <i>Scire facias</i>—Summons to show cause, etc.</p> <p>649. (c) Return of writ duly served and default of the same will sustain judgment.</p> <p>650. (d) An issue may be raised on <i>scire facias</i>.</p> <p>651. When answer unsatisfactory. (a) Generally.</p> <p>652. (b) When, only, an issue can be raised.</p> <p>653. (c) When an issue must be raised or the garnishee discharged.</p> | <p>§ 654. (d) How the issue to be raised.</p> <p>655. Same — Further interrogatories.</p> <p>656. Nature of the issue.</p> <p>657. When evidence on issue. (a) The burden of proof.</p> <p>658. (b) The answer as evidence.</p> <p>659. (c) Previous statements of the garnishee.</p> <p>660. (d) The garnishee's defenses.</p> <p>661. Supplemental or amended answer.</p> <p>662. Judgment on trial of traverse.</p> <p>663. Same—Costs.</p> |
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§ 647. When garnishee fails to answer—(a) Generally.—The answer of the garnishee is the primary evidence on which the plaintiff must base a judgment against him. If such evidence be insufficient, or if there be no such evidence then there can be no judgment for the plaintiff until the liability of the garnishee is otherwise established. If such evidence be insufficient then an issue should be raised in the manner hereinafter set forth,¹ and further disclosure procured or evidence *aliunde* introduced. If there be no answer then the default of the answer will be taken as a confession that he is indebted to the defendant and final judgment will be entered against him after he has been given an opportunity to defend. This is usually by entering judgment *nisi* on default with *scire facias*, rule to

1. *Post*, § 654.

answer, rule to show cause why judgment should not be entered against him, or other local practice for making a default judgment final.

§ 648. (b) *Scire facias*—Summons to show cause, etc.—Final judgment can not be entered against a garnishee simply upon his default to answer, as he is by the writ commanded to do. The default alone is not considered to be a *prima facie* showing of his liability. There must be some further evidence of his indebtedness to the defendant. He should be subjected to examination, or some proof made of his liability either by evidence or by his implied confession of liability by failure to appear and negative the same.¹ Therefore a further writ of *scire facias* or some equivalent summons or notice should be issued and served upon him commanding him to appear and defend, or abide the judgment of the court.²

No *scire facias* can be issued against the garnishee until a judgment *nisi* or conditional judgment has been first entered.³ But by the Michigan practice where the writ is not a *scire facias* but a “summons to appear and show cause,” the same may be issued upon a judgment being entered against the principal defendant, and the plaintiff may thereafter declare against the garnishee in trover.⁴

§ 649. (c) Return of writ duly served and default of the same will sustain judgment.—Where a judgment *nisi* has been entered and a writ of *scire facias* thereafter issued or other prescribed process sued out, and the same has been legally served

1. *Flanagan v. Earnest*, 1 Chand. (Wis.) 149; *Freeman v. Miller*, 53 Tex. 372; *Hackley v. Kanitz*, 39 Mich. 398; *Brotherton v. Anderson*, 6 Mo. 388; *Lewis v. Faul*, 29 Ark. 470.

2. *Finch v. Bullock*, 10 Phila. (Pa.) 318; *Murphy v. Merrill*, 12 Cush. (Mass.) 284.

It is within the discretion of the court, on the application of the garnishee, to direct the plaintiff to issue

scire facias against the garnishee. *Finch v. Bullock*, 10 Phila. (Pa.) 318.

3. *Whitehead v. Henderson*, 12 Miss. (4 Smed. & M.) 704; *Buckingham v. Bailey*, 12 Miss. (4 Sm. & M.) 538.

4. *Elser v. Rommel*, 98 Mich. 74, 56 N. W. Rep. 1107.

And under particular circumstances he has been allowed to declare, without the formality of a summons, to show cause. *Elser v. Rommel*, 98 Mich. 74, 56 N. W. Rep. 1107.

and returned, and thereafter the garnishee fail to answer within the time given him so to do, a final judgment may be entered in the garnishment proceeding against him.¹ The averments of the plaintiff in garnishment on a *scire facias* should state with precision and certainty the nature and amount of the property attached, and show in whose possession the same was at the time, and make it affirmatively to appear that there is a good cause of action against the garnishee sought to be charged.² And where the garnishee has, under the writ, confessed that he is indebted to the defendant, the judge is authorized to order him forthwith to pay the same.³ After the garnishee has an opportunity to make his defense and has neglected so to do, and a judgment has been regularly entered against him, he will be estopped from thereafter objecting to the irregularities of the same.⁴

§ 650. (d) An issue may be raised on *scire facias*.—When a garnishee has made default in answering or has not answered sufficiently, and he is brought in by *scire facias* or other

1. Wood v. Russell, 22 Ala. 645; (Conn.) 324; Neal v. Cook, 10 N. J. Armstrong v. Dargan, 11 Ala. 506; L. (5 Hals.) 337; Welsh v. Blackwell, Burns v. Belknap, 22 Vt. 419; Ring- 14 N. J. L. (2 Green.) 344; Treadway v. Brindle, 59 Pa. St. 51. v. Andrews, 20 Conn. 384; Culver v.

After a judgment *nisi* had been entered and two succeeding writs had been issued, both of which had been returned *non est*, a final judgment was entered and sustained against him. Parish, 21 Conn. 408; Bickford v. Boston, etc., R. R. Co., 21 Pick. (Mass.) 109.

3. State v. Bermudez, 39 La. Ann. 622, 2 So. Rep. 425.

4. Abell v. Simon, 49 Md. 318; Matheny v. Galloway, 20 Miss. (12 Sm. & M.) 475; Lomerson v. Hoffman, 24 N. J. L. 674.

Where the garnishee has made a default both before and after judgment *nisi* on *scire facias*, the plaintiff may recover the whole amount of the debt due from the garnishee to the principal defendant, and all costs against him in the garnishment proceedings and *scire facias*. Matheny v. Galloway, 20 Miss. (12 Sm. & M.) 475.

2. Laight v. Tomlinson, 2 Root (Conn.) 233; Wilford v. Jones, 2 Root

like writ, an issue may be thereafter raised between the garnishee and the plaintiff; but like the issue raised in all proceedings when the answer is unsatisfactory, it is confined to the issue that would have been raised had an action been begun by the principal defendant against the garnishee on the same demand.¹ And all evidence introduced therein must be relevant to the issue so limited. It is not a new suit but an incident to or a continuation of the original process.² The garnishee may show that no legal service was made upon the principal defendant,³ or that the judgment entered against such defendant was illegal and void.⁴ For the court having no jurisdiction in such cases, the proceedings against the garnishee must fail.⁵ But he can not question the regularity of the proceedings.⁶ Everything which goes to the merits of the suit against the garnishee may be availed of in defense to the *scire facias*.⁷ He may plead and show any matter of fact or law which goes to his protection.⁸ The plaintiff must show, in proof of the issue on *scire facias*, that there is a demand existing on the part of the principal defendant against the garnishee which would sustain an action of debt or *indebitatus assumpsit*.⁹ If, on *scire facias*, the plaintiff read the garnishee's

1. See *post*, § 650.

2. *Adams v. Rowe*, 11 Me. 89; *Todd v. Darling*, 11 Me. 34.

3. *Cota v. Ross*, 66 Me. 161.

4. *Coit v. Haven*, 30 Conn. 190; *Thayer v. Tyler*, 10 Gray (Mass.) 164.

He can show that the principal defendant is not an absconding debtor and that therefore the attachment is unauthorized. *Hubbard v. Brown*, 1 Root (Conn.) 276; *Fowler v. Spelman*, 1 Root (Conn.) 295; *Woodbridge v. Winthrop*, 1 Root (Conn.) 557.

Defense limited.—When *scire facias* is sued out on an execution the defendant is not allowed to plead that which he might have pleaded in abatement before judgment was en-

tered. *Wilcox v. Mills*, 4 Mass. 218.

5. *Pratt v. Cunliff*, 9 Allen (Mass.) 90; *ante*, § 642.

6. *Lomerson v. Hoffman*, 24 N. J. L. (4 Zab.) 674; *O'Connor v. O'Connor*, 2 Grant (Pa. Cas.) 245.

7. *Hoyt v. Robinson*, 10 Gray (Mass.) 371; *Harvey v. Mix*, 24 Conn. 406; *Smyth v. Ripley*, 33 Conn. 306.

And he may testify upon the issue of *scire facias*, although he be not required by the plaintiff so to do. *Vaughn v. Sherwood*, 1 Root (Conn.) 507.

8. *Welsh v. Blackwell*, 15 N. J. L. (3 Green) 55.

9. *Lomerson v. Huffman*, 25 N. J. L. (1 Dutch.) 625; *ante*, § 482.

Where it appears that something yet remains to be done before the de-

answers to interrogatories he may still contradict them by proof that the (garnishee) defendant had answered differently on a previous occasion,¹ to the same effect as if the issue had been otherwise raised.² The defendant may raise the same questions as if he had demurred and the court will allow to the defendant the same privilege of amendment as in case of demurrer.³ A third person who claims the attached property may also be admitted as a party, and for the first time, on *scire facias* against a defaulted garnishee.⁴

§ 651. **When answer unsatisfactory—(a) Generally.**—The purpose of the garnishee's answer is that there may be a liability shown from the garnishee to the principal defendant on which the court may base a judgment of condemnation for the plaintiff.⁵ If no such liability is shown, no judgment can be had by the plaintiff against the garnishee.⁶ The answer must show such a liability or the plaintiff can not obtain the relief which he seeks. If the answer does not unequivocally admit an indebtedness to the principal defendant, or the possession of property belonging to him, such answer certainly will not be satisfactory to the plaintiff. It is safe to say, therefore, that in every state some method is provided by which a plaintiff is relieved from the necessity of submitting to the insufficiency, uncertainty, equivocation, or untruthfulness of the answer in

defendant would have a cause of action, the plaintiff will not be entitled to judgment against the garnishee on *scire facias*, for the garnishee must be put in no worse position than he would have been had the suit been begun by the principal defendant. *Curtis v. Alvord*, 45 Conn. 569; *ante*, § 481.

1. *Adlum v. Yard*, 1 Rawle (Pa.) 163.

2. *Post*, § 654.

3. *Lomerson v. Hoffman*, 24 N. J. L. 674.

If on *scire facias* the garnishee on "examination on oath" knowingly

and willfully make false answers to any fact material to his liability as a garnishee he will render himself liable to an action on the case for damages. *Laughran v. Kelly*, 8 Cush. (Mass.) 199.

Costs against the (garnishee) defendant was awarded where he came in late with a new answer showing that he should be discharged. *Burnside v. Newton*, 1 Metc. (Mass.) 426.

4. *Knights v. Paul*, 11 Gray (Mass.) 225.

5. *Ante*, §§ 617 and 622.

6. *Ante*, § 638, *et seq.*

the first instance. The mode of procedure in the several states is not uniform in this regard, but the object to be attained is the same. The plaintiff is provided with a means of obtaining some further and more specific answer, or disclosure, from the garnishee, either by causing the garnishee to submit to an oral examination, to answer written interrogatories, to file a further answer, or to join in the trial of the issue before a court or jury, as in the trial of other cases of matter of fact. If there is any case in which a plaintiff is not entitled to a further disclosure, when he is not satisfied with the answer the garnishee has filed, it is when the court has obtained no jurisdiction over the principal defendant, and where the garnishee has averred in his answer that he is not indebted and has no property in his possession belonging to such principal defendant. In such a case it is doubtful if the court have jurisdiction, even as of a proceeding *in rem*. But it is generally assumed that a court in such a case having acquired jurisdiction over the garnishee may compel him to submit to a further examination when the plaintiff does not believe that he has answered truly.¹ If the plaintiff does not take exception of the answer, or endeavor to have a proper disclosure made by traverse, or otherwise, within a reasonable time, the garnishee is himself entitled to judgment on an answer which does not admit an indebtedness; for the plaintiff can not have such answer stricken from the files on the ground of its insufficiency.² Where, however, a garnishee's answer is in itself inconsistent by containing both a general denial of liability and stating particular facts which are contrary thereto, the particular facts will control and judgment may be entered without raising an issue and contesting the answer.³ And the proper way of bringing a case to

1. *Myers v. Smith*, 29 Ohio St. 120; *The People, ex rel. Townsend & Alexander, v. Cass Circuit Judge*, 39 Mich. 407; *Adams v. Filer*, 7 Wis. 265; *Seamon v. Bank of Berkeley*, 4 W. Va. 339; *García y Leon v. La. Mut. Ins. Co.*, 31 La. Ann. 546; *Rutter v. Boyd*, 3 Abb. (N. Y.) N. Cas. 6; *Mallet v.*

London, 2 Hayw. (N. Car.) 158; *Lancaster Bank v. Gross*, 50 Pa. St. 224; *Tavel v. Barre*, 2 M'Cord (S. Car.) 201; *Foster v. Saffell*, 1 Swan (Tenn.) 90.

2. *Selz v. First Nat. Bank*, 55 Wis. 225; *Burrus v. Moore*, 63 Ga. 405.

3. *White v. Kahn*, (Ala.) 15 So. Rep. 595.

a hearing on the answers seems to be to file a demurrer thereto.¹ A court has power to require a garnishee to make a more definite and certain answer.² And in Alabama an issue may be made up as to the indebtedness of the garnishee upon his answer of his own motion, and it may be made at the request of either party and tried by jury.³ Whatever the local practice may be, the plaintiff need not submit to a judgment upon the garnishee's answer, if the same is unsatisfactory to him because of its uncertainty or indefiniteness, or if he believed it to be untrue.

§ 652. (b) When, only, an issue can be raised.—Where a garnishee has answered each and every interrogatory propounded to him, explicitly and categorically, showing that he is not indebted or has no property belonging to the principal defendant, the plaintiff has no right to compel him to make a further answer,⁴ except where, by special provision of statute, he is, upon his denial of the truthfulness of the answer, empowered to raise an issue of fact tried thereon as in other cases.⁵

§ 653. (c) When an issue must be raised or the garnishee discharged.—When the answer of the garnishee denies indebtedness or liability to the principal defendant; or when it makes out a *prima facie* case for the garnishee, either by a denial or an affirmation of new matter conducing to overthrow it; or even if it be so uncertain or indefinite as not to make

1. Fox v. Reed, 3 Grant (Pa.) Cas. 81.

But in Mississippi it has been said not to be necessary in order to test the legal sufficiency of the defense set up in the answer that the same should be demurred to; a motion for judgment upon the answer being there sufficient. Beer v. Hooper, 32 Miss. 246.

2. Lusk v. Galloway, 52 Wis. 164.

3. Lehman v. Hudmon, 85 Ala. 135, 4 So. Rep. 741.

4. Hoagland v. Stodolla, 1 Code R. (N. Y.) N. S. 210; Mack v. Brown, 20 Mich. 335; Reynolds v. Fisher, 48 Barb. (N. Y.) 146; Carroll v. Finley, 26 Barb. (N. Y.) 61; Stedman v. Vickery, 42 Me. 132; McMillan v. Hobson, 41 Me. 131; Ullmeyer v. Ehrmann, 24 La. Ann. 32.

5. Farmers' and Mechanics' Bank v. Welles, 23 Minn. 475; McCause v. McClure, 38 Mo. 410; Hess v. Shorb, 7 Pa. St. 231; Johann v. Rufener, 30 Wis. 671.

him "clearly chargeable," or the court is left in reasonable doubt of his liability, such answer will be taken as true in what it does state; and, no presumption arising as to the liability of the garnishee, he will be discharged, unless the truthfulness of such answer is questioned and an issue tried thereon.¹ Where the admission of indebtedness is not unqualified, no judgment can be obtained by the plaintiff against the garnishee, unless he is given notice and an opportunity to defend himself.² If the plaintiff see fit he may traverse the answer, when he will be entitled to a trial, and may show by evidence *aliunde* that the garnishee is indebted, or has in his possession property belonging to the principal defendant.³

§ 654. (d) **How the issue to be raised.**—The rules of practice by which an issue upon a garnishee's answer is raised are special and local, and the practitioner is referred to the controlling statute; but the answer being on oath, it is only brought in question by some declaration, complaint, affidavit, or replication on the part of the plaintiff controverting on oath the facts stated in the answer. On a traverse of the answer there must be an averment on oath that such answer is believed to be untrue; for no contest of a garnishee's answer can be based on an unverified traverse thereof.⁴

It was once said that a general traverse of the truthfulness

1. *Ante*, §§ 638-646; *Pierce v. Carleton*, 12 Ill. 358; *Rankin v. Simonds*, 27 Ill. 352; *Laschear v. White*, 88 Ill. 43; *Morse v. Marshall*, 22 Iowa 290; *McDowell v. Crook*, 10 La. Ann. 31; *Flash v. Norris*, 27 La. Ann. 93; *Wheelock v. Tuttle*, 10 Cush. (Mass.) 123; *Williams v. Jones*, 42 Miss. 270; *Keating v. A. R. Co.*, 32 Mo. App. 293; *Holton v. S. P. R. Co.*, 50 Mo. 151. *Myatt v. Lockhart*, 9 Ala. 91; *Brake v. Curd-Sinton Mfg. Co.*, 102 Ala. 339, 14 So. Rep. 773; *Lindsay v. Morris*, 100 Ala. 546, 13 So. Rep. 619; *Wright v. Swanson*, 46 Ala. 708; *Donald v. Nelson*, 95 Ala. 111, 10 So. Rep. 317; *Twelves v. Lodano*, 15 Ala. 732; *Moore v. Jones*, 13 Ala. 296; *M'Cain v. Wood*, 4 Ala. 258; *Welsh v. Noyes*, 10 Colo. 133, 14 Pac. Rep. 317.

2. *Estill v. Goodloe*, 6 La. Ann. 122.
3. *Thompson v. Fischesser*, 45 Ga. 369; *Curry v. The Nat. Bank of Augusta*, 53 Ga. 28; *Hess v. Shorb*, 7 Pa. St. 231.

4. *Adkins v. Watson*, 12 Tex. 199;

of the answer was sufficient;¹ but again in the same state it was held that where the garnishee had denied all indebtedness, a general allegation that he was indebted and had effects, without specifying how he was indebted or what were the effects, was no traverse of an answer;² and in another state it was held that the trustee was entitled to a specification of the grounds on which the plaintiff would attempt to charge him.³ This, at least, is the better practice, and will be generally followed. And a replication will be stricken from the files which does not deny the facts set forth in the answer.⁴

The statement on oath, which is required to put in issue the answer of the garnishee, must generally be made by the plaintiff, and not his agent or attorney,⁵ unless the same is specially permitted by the statute.⁶

The plaintiff's traverse of the garnishee's answer is generally informal, a simple denial being all that is generally required. An affidavit of the incorrectness of the answer is usually sufficient to satisfy the statute.⁷ For all that is generally required is in effect that the plaintiff "shall allege that the garnishee hath not disclosed the true amount of debts due from him to the defendant." The court will then, without formality of pleading, try the issue thus raised or order a jury to be impaneled to inquire of the true amount.⁸ The plaintiff need

1. *Turner v. Rosseau*, 21 Ga. 240.

2. *Wiley v. Planters', etc., Bank*, 584.
Ga. Dec. (Part II) 187.

3. *Wright v. Bosworth*, 5 N. H. 400.

4. *Goddard v. Guittar*, 80 Iowa 129,
45 N. W. Rep. 729.

5. *Givens v. Taylor*, 6 Tex. 315.

6. *Faulks v. Heard*, 31 Ala. 516.

Nor can the garnishee empower another person to answer for him on oath interrogatories in writing or on oral examination. *Cornell v. Payne*, 115 Ill. 63; *Dickson v. Morgan*, 7 La. Ann. 490.

7. *Marston v. Carr*, 16 Ala. 325; *Thompson v. Allen*, 4 Stew. & P. (Ala.) 184; *Duncan v. Wickliffe*, 4 Metc. (Ky.) 118.

8. *McCoy v. Williams*, 6 Ill. (1 Gilm.)

An affidavit averring "that the said garnishee is indebted to the said defendant in attachment and was at the time of the service of the garnishment" has been held to be sufficient. *Harrell v. Whitman*, 19 Ala. 135.

Plaintiff may amend his pleading.—Where the plaintiff's pleading on the traverse improperly joined two garnishees as defendants, when one had been dismissed, he was permitted to amend his pleading and take issue upon the answer of the remaining garnishee. *Coffman v. Ford*, 56 Iowa 185.

not aver the recovery of a judgment against the principal defendant when the same has been rendered before the proceeding in garnishment, for the court will take judicial notice thereof when the record in the case discloses that fact.¹

When it is not claimed that the answer of the garnishee is false, but it is only alleged that the facts averred in the answer show him to be indebted to the principal defendant, instead of otherwise, as claimed by him, it is said no controverting affidavit is needed.² But this does not raise an issue; it only calls for judgment on the answer the same as a demurrer to the answer,³ or a motion for judgment upon the answer.⁴

The sufficiency of the garnishee's answer is sometimes questioned by excepting thereto; then if the court sustains the exceptions it will order a further answer to be filed, and if the garnishee makes default therein, judgment will be entered against him.⁵

The raising of an issue by traverse must be within the time limited by statute therefor, or the plaintiff will be deemed to have waived his right to have a trial of an issue on the answer and the garnishee will be entitled to be discharged by a judgment on his answer.⁶

The garnishee is, under some statutes, charged with notice, whether or not his answer is traversed, and no notice to him

1. *Henny Buggy Co. v. Patt*, 73 Iowa 485, 35 N. W. Rep. 587; *Kelly v. Gibbs*, 84 Tex. Sup. 143, 19 S. W. Rep. 563.

2. *Swearingen v. Wilson*, 2 Tex. Civ. App. 21, 21 S. W. Rep. 74.

3. *Fox v. Reed*, 3 Grant (Pa.) Cas. 81.

4. *Beer v. Hooper*, 32 Miss. 246.

Though a plaintiff be able to question the truth of the garnishee answer without a formality, or a replication, or denial, yet such a reply, if filed, will limit the issue. *Freese v. Ferguson*, 67 Iowa 42.

5. *Richardson v. White*, 19 Ark. 241.

In Georgia, where the answer should not be made until the term of court to which the garnishee summons is returnable, an answer primarily made may be excepted to. If the exception is sustained the answer may then be amended. *Plant v. Mutual Life Ins. Co.*, 92 Ga. 636, 19 S. E. Rep. 719.-

6. *Brake v. Curd-Sinton Mfg. Co.*, 102 Ala. 339, 14 So. Rep. 773; *Lindsay v. Morris*, 100 Ala. 546, 13 So. Rep. 619; *McDaniel v. Reed*, 12 Ala. 615; *Ashley v. Dunn*, 4 Ark. 516; *Banks v. Hunt*, 70 Ga. 741; *Consumers' Ice Co. v. Cook Well Co.*, 71 Miss. 886, 16 So. Rep. 259; *Columbus Ins. & Banking Co. v. Hirsh*, 61 Miss. 74.

of that fact is then required.¹ Under other statutes he is charged with notice for a given time, as during the term at which his answer is filed, and if a traverse is thereafter permitted, notice must be given thereof to the garnishee.² Others require notice from the plaintiff to the garnishee that the truthfulness of his answer has been put in issue,³ and still others require that a summons shall be sued out of the court and served upon the garnishee commanding him to be present at the trial of the issue and abide the judgment of the court thereon.⁴ Whatever notice is required must be given, for if not and a default be entered against the garnishee for his non-appearance at the trial of the issue, such default may be set aside on motion of the garnishee.⁵

§ 655. **Same—Further interrogatories.**—Another procedure often provided whereby a garnishment plaintiff, who is not satisfied with the answer of the garnishee, may procure a further or more minute disclosure from him, and may introduce evidence to contradict the same, is the filing of “further interrogatories” in writing; or requiring the garnishee to submit to an oral examination which is the same in principle. Some notice is generally required to be given to the garnishee that he will be further required to answer such interrogatories, and he must be given a prescribed or reasonable time before the day for answering.⁶ The court is generally asked for an order on him to answer the further interrogatories and it is within the sound discretion of the court whether or not such order be granted, and it will not be granted where such interrogatories relate entirely to immaterial matters.⁷ Further

1. *Mandeville v. Askew*, 78 Ga. 18.
2. *Kienne v. Anderson*, 13 Iowa 565.

3. *Mahoney v. McLean*, 28 Minn. 63; *McGraph v. Dorfeuille*, 2 Browne (Pa.) 101.

4. *Smith v. Blatchford*, 2 Ind. 184; *Smith v. Wright*, 6 Blackf. (Ind.) 550.

5. *O'Fallon v. Davis*, 38 Mo. 269.

6. *Case v. Noyes*, 16 Ore. 329, 19

Pac. Rep. 104; *Ober v. Matthews*, 24 La. Ann. 90; *McKinbrough v. Castle*, 19 La. Ann. 128; *Cockfield v. Tourres*, 24 La. Ann. 168.

7. *Callender v. Furbish*, 46 Me. 226; *Warner v. Perkins*, 8 Cush. (Mass.) 518; *Briggs v. Block*, 18 Mo. 281.

Under the Iowa code it is said that the plaintiff has no absolute unrestricted right to examine the gar-

interrogatories must relate to the matter in issue and are circumscribed by the rules relating thereto.¹ They should be confined to matters tending to disclose the indebtedness or possession or control of property belonging to the principal defendant.² When such interrogatories are material he will be bound to answer, although his answers may tend to impeach or impair his title to real estate.³ And he is not excused from answering them though they may tend to discover fraud on his part, provided they do not tend to charge him criminally.⁴ The garnishee is not required to answer irrelevant interrogatories.⁵ And if he refuse to answer such as relate to matters occurring between him and the principal defendant since the service of the writ, and which he has stated in his answer are unconnected with the transaction with the defendant prior to the service thereof, his *refusal* to answer will not be sufficient to charge him as a garnishee.⁶ It is error to render judgment against a garnishee on the ground that his answers to interrogatories are impertinent, where the court has not required him to answer the same; and especially so where he has offered to answer whenever the question should be, by the court, adjudged to be a proper one.⁷ The court having neither ordered nor been called upon to order the garnishee to answer the interrogatory, his refusal to answer it will not be sufficient on

nishee, but that it is within the discretion of the court after the questions are submitted in writing and passed upon by it. *Elwood v. Crowley*, 64 Iowa 68.

In Massachusetts the plaintiff has been allowed to file further interrogatories for the purpose of ascertaining the condition of the accounts between the parties and was allowed to ask him whether he did not assign his claim against the defendant before the service of the writ, but he was not allowed to be asked whether he was not aware of that fact when he answered the preceding interrogatories. *Nutter v. Farmingham and Lowell R. R. Co.*, 131 Mass. 231.

1. *Frizzell v. Willard*, 37 Ark. 478; *post*, § 656, "The Issue."

2. *Corbyn v. Bollman*, 4 Watts & S. (Pa.) 342; *State Nat. Bank v. Boatner*, 39 La. Ann. 843, 2 So. Rep. 589.

3. *Bell v. Kendrick*, 8 N. H. 520.

On the contrary it is held in Maine that a trustee need not answer an interrogatory which tends to disparage his title to real estate. *Moor v. Towle*, 38 Me. 133.

4. *Neally v. Ambrose*, 21 Pick. (Mass.) 185.

5. *Rhine v. Danville, etc.*, R. R. Co., 10 Phila. (Pa.) 336.

6. *Humphrey v. Warren*, 45 Me. 216.

7. *Sawyer v. Webb*, 5 Iowa 315.

which to base a judgment against him as a garnishee, unless the question have a tendency to bring out some fact relevant to the issue.¹ It is further said, however, that the court will not interfere to compel a garnishee to answer a particular interrogatory but will leave him to act at his peril.²

§ 656. **Nature of the issue.**—The issue between the plaintiff in garnishment and the garnishee is wholly separate and distinct from the issue between the plaintiff and principal defendant. Furthermore, the verdict thereon will be separate and special, pertaining only to the garnishee.³ It is strictly a proceeding at law and is to be tried as ordinary issues between a plaintiff and defendant. The allegations, answers and denials are then only considered as pleadings and the garnishee's answer is not on the trial of this issue considered as true.⁴ The issue is confined to the denial of the answer. It is confined to a general allegation that the garnishee is indebted to the defendant and the jury are restricted to decide on the truth of the return.⁵ The issue is the same as it would be on an action between the principal defendant and the garnishee and no other.⁶ Where the answer denied an indebtedness and an

1. *Lyman v. Parker*, 33 Me. 31.

2. *Smith v. Cahoon*, 37 Me. 281.

Where an unsatisfactory answer had been made and a further examination ordered, to which the garnishee refused to submit, and both he and the principal defendant died before the next term, judgment was entered against both as of the preceding term. *Patterson v. Buckminster*, 14 Mass. 144.

3. *Roberts v. Barry*, 42 Miss. 260; *Mygatt v. Burton*, 74 Wis. 352, 43 N. W. Rep. 100.

4. *Case v. Noyes*, 16 Ore. 329, 19 Pac. Rep. 104; *Zanz v. Stover*, 2 New Mex. 29; *Lyatt v. Lockhart*, 9 Ala. 91.

5. *Nesbitt v. Ware*, 30 Ala. 68; *Crew v. McClung*, 4 Greene (Iowa) 153; *Perea v. Colorado Nat. Bank*, — N. Mex. —, 27 Pac. Rep. 322; *Myatt*

v. Lockhart, 9 Ala. 91; *Westmorland v. Tippens*, 1 Bailey (S. Car.) 514.

The plaintiff can not select a part of the answer and take issue thereon. The whole answer is in issue. *Myatt v. Lockhart*, 9 Ala. 91.

Where the trial of the issue is referred to a commissioner, the whole case as to the liability of the garnishee is referred. The report of the commissioner will be considered to contain the whole case and if it contain no reference to the "answer" as containing further facts, the court can take no notice of the facts so stated. *Lovejoy v. Lee*, 35 Vt. 430.

6. *Warne v. Kendall*, 78 Ill. 598; *Haines v. O'Conner*, 5 Ill. App. 213.

In Illinois the issue is between the defendant and the garnishee, the defendant becoming the plaintiff on

issue is raised thereon, the proof of the validity of the transfer of such indebtedness can not be tried;¹ nor can the garnishee's title to property in his possession.² The plaintiff having elected to controvert the answer instead of admitting it, the fact that the title is in another, as shown by the answer, does not affect this issue in which the plaintiff avers the garnishee's indebtedness to the defendant.³ If, however, the title of another is shown by the garnishee, the validity of the transfer may be questioned and the person indicated may be called into the suit.⁴

The indebtedness of the principal defendant to the garnishing creditor is wholly without the issue raised on a traverse of the garnishee's answer, and can not be submitted to the jury which tries the issue between the plaintiff and garnishee.⁵ Nor can the declarations of the principal defendant be received in evidence against the garnishee. The principal debtor is not a competent witness in such case⁶. Neither is the wife of the principal defendant.⁷ But the defendant is a competent witness for the garnishee on the trial of the issue, because they have contrary interests;⁸ nor is he entitled to notice that the garnishee is to be examined.⁹

such issue, and it is irregular to make up and try an issue between the garnishee and the attaching creditor. *Warne v. Kendall*, 78 Ill. 598; *Haines v. O'Conner*, 5 Ill. App. 213.

1. *Fowler v. Williamson*, 52 Ala. 16.

2. *Ivens v. Ivens*, 30 La. Ann., Part I, 249; *Simpson v. Tippin*, 5 Stew. & P. (Ala.) 208.

3. *Myatt v. Lockhart*, 9 Ala. 91.

4. *Myatt v. Lockhart*, 9 Ala. 91; *Scott v. Stallworth*, 12 Ala. 25.

Such an issue can be tried on a direct suit brought between the plaintiff and garnishee to try the sufficiency of that title. *Ivens v. Ivens*, 30 La. Ann., Part I, 249.

5. *Jones v. Pope*, 6 Ala. 154; *Capital City Bank v. Wakefield*, 83 Iowa 46, 48 N. W. Rep. 1059.

6. *Cahoon v. Ellis*, 18 Vt. 500.

7. *Coburn v. Mellen*, 19 N. H. 198; *Forrester v. Guerrineau*, 1 M'Cord (S. Car.) 304.

8. *Jones v. Bank of Northern Liberties*, 44 Pa. St. 253; *McCormac v. Hancock*, 2 Pa. St. 310; *De Witt v. Baldwin*, 1 Root (Conn.) 138; *Bell v. Jones*, 17 N. H. 307. That he is *prima facie* an incompetent witness for the garnishee, see *Marston v. Carr*, 16 Ala. 325.

The declarations of an absconding debtor are not evidence for the plaintiff, but his deposition is admissible on the part of the garnishee to prove that the effects attached belonged to a stranger. *Enos v. Tuttle*, 3 Conn. 247.

But the local statute must be observed in regard to the competency of interested parties as witnesses.

9. *Jones v. Roberts*, 60 N. H. 216; *Morrison v. Barker*, 50 N. H. 529.

§ 657. **The evidence on issue—(a) The burden of proof.**—When an issue is formed on the truthfulness of the answer, the trial of it will be controlled by the rules regarding other trials of issues of fact. The joining of the issue, even though orally, casts upon the plaintiff the burden of showing that he is entitled to a judgment. The answer of the garnishee denying liability is *prima facie* evidence in his behalf, and, unless the plaintiff impeaches the truth of its averments by other evidence, the garnishee will be discharged. The burden of proving the garnishee's indebtedness is on the plaintiff, and he can only obtain a verdict by a preponderance of testimony. He is at liberty to introduce other evidence than the disclosure of the garnishee for the purpose of proving the garnishee's indebtedness, and the law does not prescribe the order in which such proof shall be received.¹ No presumption arises against the garnishee, unless he fails to answer fully and clearly the matters within his knowledge.² The burden is on the plaintiff to show what credits or effects were in the garnishee's hands at the time of the service upon him.³ And though the answer may admit that goods were in the hands of the garnishee at a time previous to the service of process, the burden is upon the plaintiff to show that the goods were in the garnishee's possession when the writ was served upon him.⁴ If it is shown by the answer that an assignment of the property in his hands was made on the day the garnishment process was served upon him, the plaintiff must show that the service was made previous to the assignment.⁵ An assignment being admitted, it will be presumed that it was fair and for a valuable consideration; therefore, if the plaintiff attempts to im-

1. Rippen v. Schoen, 92 Ill. 229; East Line, etc., R. R. Co. v. Terry, 50 Kergin v. Dawson, 6 Ill. (1 Gilm.) 86; Tex. 129; Thompson v. Stewart, 3 Field v. Malone, 102 Ind. 251; Smith Conn. 171.

v. Clarke, 9 Iowa 241; De Witt v. Baldwin, 1 Root (Conn.) 138; Holton v. South Pacific R. R. Co., 50 Mo. 151; 2. Williams v. Housel, 2 Iowa 154; Farwell v. Howard, 26 Iowa 381.

3. Caldwell v. Coates, 78 Pa. St. 312. 4. Bethel v. Linn, 63 Mich. 464, 30 N. W. Rep. 84.

5. Weire v. Davenport, 11 Iowa 49. 672, 22 S. W. Rep. 72; Kelly v. Gibbs, 84 Tex. Sup. 143, 19 S. W. Rep. 380;

peach it on the ground of fraud, the burden is upon him to prove at least a *prima facie* case of fraud.¹ If the garnishee admits a certain indebtedness, and the plaintiff alleges a greater indebtedness, the burden is upon him to prove that fact.² Where a conditional promise has existed from the garnishee to the principal defendant, the burden is upon the plaintiff to show not only the existence of the promise, but that its conditions have been fulfilled.³ The plaintiff must make out a case against the garnishee.⁴ The garnishee is held liable or not, upon a just view of all the facts. The evidence on the winning side must be fairly preponderating. If it be not affirmatively shown, either by the answer of the garnishee or by collateral proofs that he is liable, then he will be discharged.⁵

The burden of proof is upon the garnishee to make a *prima facie* case entitling him to be discharged. This he will do in the first instance by his answer showing his lack of liability. If no such answer is filed, judgment may be entered against him on default as above shown, in which case the facts sworn to by the plaintiff in obtaining the attachment is taken to be true, and no burden is cast upon the plaintiff until the garnishee makes out a *prima facie* case by his answer.⁶ The burden of proof being upon the plaintiff in the first instance on the trial of the issue upon answer, it may be shifted to the garnishee by the plaintiff's showing that property or effects were in the hands of the garnishee at the time of service of process upon him.⁷ When the garnishee has admitted in his

1. Thomas v. Sturges, 32 Miss. 261; Wilhelmi v. Haffner, 52 Ill. 222.

That the burden rests upon the garnishee to show that a transfer was *bona fide* and upon a valuable consideration (where he has admitted giving of a note of the defendant, and has alleged that the same was assigned before the service of garnishment), see Lyman v. Tarbell, 30 Vt. 463.

2. Bunker v. Hibler, 49 Mo. App. 536; Erbs v. Weimer, (Pa. Com. Pl.) 32 W. N. C. 204.

3. Caldwell v. Silva, 23 Mo. App. 417.

4. Ladd v. Gale, 57 N. H. 210.

A stipulation, stating that if the court finds for the plaintiff, a judgment may be entered for a stated sum, is not evidence of the garnishee's indebtedness. Cairo and St. Louis R. Co. v. Killenberg, 92 Ill. 142.

5. Porter v. Stevens, 9 Cush. (Mass.) 530.

6. Simons v. Jacobs, 15 La. Ann. 425.

7. Pupke v. Meador, 72 Ga. 230.

answer that he has money in his possession belonging to the defendant, and alleges that they are affected by a trust, the burden is upon him to establish the trust.¹ If he admits a fund in his hands at a time prior to the service of the writ upon him, the burden will rest upon him to show that before the service he had expended the fund for the benefit of the defendant, and this he must show by clear and positive statements, not omitting details and particulars.² When also he admits an indebtedness, but alleges an exemption, the burden is upon him to establish the exemption.³ Furthermore, when he admits an indebtedness, but alleges a cross-demand, the burden rests upon him to show that such cross-demand was complete before service of process upon him.⁴

§ 658. (b) **The answer as evidence.**—In the trial of an issue raised upon a garnishee's answer, the rule hereinbefore stated⁵ that the garnishee's answer is to be taken as true does not apply. On a trial of the issue between the plaintiff and garnishee, the latter's answer becomes his pleading, and will not be taken as conclusive proof against the plaintiff.⁶ It has no greater force than if it were his answer to a petition in a suit by the defendant against him.⁷ As a pleading, it is before the court without the necessity of being offered in evidence.⁸ The better rule is that the answer is to be considered by the jury as much as any other pleading in the case, and such weight given to it as they may believe it to be entitled when considered in connection with all the circumstances of the case.⁹ It is not, like an answer in equity, evidence for the garnishee.¹⁰ The answer when considered as evidence must

1. *Frank v. Frank*, 6 Mo. App. 589; *Sheldon v. Hinton*, 6 Ill. App. 216.

This he can not do by showing a deed of assignment made in another state, unless he also shows that it is valid in this state. *Frank v. Frank*, 6 Mo. App. 589.

2. *Barker v. Osborne*, 71 Me. 69.

3. *Oakes v. Marquardt*, 49 Iowa 643.

4. *Pennell v. Grubb*, 13 Pa. St. 552.

5. *Ante*, § 636.

6. *Fearey v. Cummings*, 41 Mich. 376.

7. *Smith v. Heidecker*, 39 Mo. 157.

8. *Meyer v. Defarge*, 30 La. Ann., Part I, 548; *Smith v. Brown*, 43 N. H. 44.

9. *Schwab v. Gingerick*, 13 Ill. 697; *Beck v. Cole*, 16 Wis. 95.

10. *Jones v. St. Onge*, 67 Wis. 520, 30 N. W. Rep. 927.

In Alabama it is said that when the garnishee's answer is controverted

contain a statement of facts on oath and not a mere expression of the garnishee's opinion, or of hearsay. It is governed by the rules controlling the testimony of witnesses in other cases.¹

The answer of a garnishee, being the plaintiff's evidence to the establishment of a liability, the garnishee is therefore the plaintiff's witness and his credibility can not be impeached. The answer can only be contradicted by showing him to be unworthy of belief. His testimony as given in the answer can only be contradicted by disproving the facts therein stated.² The sworn answer stands as *prima facie* evidence,³ and must be overthrown by a preponderance of other testimony. In Louisiana it has been said that it could only be destroyed by the oath of two witnesses, or of one single witness, corroborated by strong circumstantial evidence or written proof.⁴

While, as before stated, the whole answer is to be considered, yet the plaintiff is at liberty, on a traverse of the answer, to read any part of it in his behalf and contest the remainder, provided he has not admitted the same by his pleading.⁵

§ 659. (c) **Previous statements of the garnishee.**—The credibility of the garnishee's statements can not be impeached. The plaintiff may disprove the facts alleged in the garnishee's answer, and if the answer show *prima facie* that the garnishee should be discharged, the plaintiff must disprove its statements according to the ordinary rules of disproving the filed, sworn

by the plaintiff it may be offered in evidence by the plaintiff, but not by the garnishee himself. *Price v. Mazange*, 31 Ala. 701; *Sevier v. Throckmorton*, 33 Ala. 512.

In Mississippi it has been said that on an issue contesting the truth of the garnishee's answer, the answer itself *can not* be read to the jury. *Lasley v. Sisloff*, 8 Miss. (7 How.) 157.

1. *Heywood v. Brooks*, 47 N. H. 231.

2. *Barnes v. Wayland*, 14 La. Ann. 791.

3. *Erskine v. Sangston*, 7 Watts (Pa.) 150.

4. *Cator v. Merrill*, 16 La. Ann. 137.

If the answer on oath alleges certain facts, and the garnishee's answers to further interrogatories not on oath sets up new matter in avoidance to the liability acknowledged in the answer, the facts stated on oath will not be affected by the facts stated not on oath. *Empire C. R. Co. v. Macey*, 115 Ill. 390.

5. *Prentiss v. Danaher*, 20 Wis. 328.

answer to a bill in chancery.¹ To this end the allegations and admissions of the garnishee, made to the plaintiff, either before or after the service of the garnishment process upon him, may be shown in evidence.² And all evidence tending to prove the acts, declarations and agreements between the plaintiff and the garnishee is admissible to contradict the averments in the garnishee's answer and to show a condition of things which will entitle the plaintiff to reach the money or property which he seeks by process of garnishment.³ But the testimony to overthrow it must be conclusive. Mere inconclusive testimony as to what the garnishee previously answered in reply to unauthorized inquiries will not affect the conclusiveness of the sworn answer.⁴ Nor can the plaintiff introduce evidence to show that the garnishee was estopped by previous representations to him from setting up matters tending to discharge him.⁵

§ 660. (d) **The garnishee's defenses.**—If the garnishee does not think that the issue on his answer is properly raised, he should move the court to dismiss it. A demurrer to the plaintiff's denial is not the proper proceeding.⁶

On an issue raised by the plaintiff upon the answer of the garnishee, the latter may make every *bona fide* defense known to him or to his counsel to defeat the garnishment proceedings. The plaintiff by his action proposes only to succeed to the rights of the garnishee's creditor, and whatever would have defeated the creditor in a suit by him to recover the alleged debt may be interposed by the garnishee, and if sufficient to

1. Quarles v. Porter, 12 Mo. 76.

2. Watson v. Montgomery, 4 Tex. Ct. of App. Civil Cases 115, 16 S. W. Rep. 546; Jones v. Norris, 2 Ala. 526; Crossman v. Crossman, 21 Pick. (Mass.) 21; Stevens v. Gwathmey, 9 Mo. 636.

3. Ellis v. Goodnow, 40 Vt. 237; Ankrim v. Woodward, 4 Rawle (Pa.) 345.

4. Quinn v. Blanck, 55 Mich. 269.

But the garnishee's written answer,

filed in a justice's court or the justice's written minutes of the garnishee's disclosure can not, on appeal, be contradicted by the oral testimony of the justice or any one else; nor can it be supplemented, so as to increase the liability which it admits. Isabelle v. Iron Cliffs Co., 57 Mich. 120.

5. Sears v. Thompson, 72 Iowa 61, 33 N. W. Rep. 364.

6. Tuttle v. Gordon, 8 Mo. 152; Curry v. Woodward, 50 Ala. 258.

defeat that action, it will be sufficient to defeat the garnishment.¹ The garnishee is confined to such matters of defense *when the principal defendant has been or is in court*, for in such case he has no right or interest in contesting the matters at issue between the plaintiff and principal defendant. He is not concerned with the regularity or merits of the defendant's case, and a plea questioning the regularity of the proceedings between them may be struck out as frivolous. The garnishee is a mere stakeholder between them and can not question the proceedings between them except when it is absolutely necessary for his own protection as shown below.² He has an equal right with any other person to make all legal defenses against the plaintiff who seeks to charge him.³ He may set up any defense necessary to his own protection whether the same be against his own creditor, the defendant, or against his creditor's creditor, the plaintiff.⁴ But it must be remembered that when his creditor, the principal defendant, is in court by personal service or appearance, the judgment or matters at issue between such principal defendant and the plaintiff are not necessary to the garnishee's protection and the garnishee can not interpose them as defenses between himself and the plaintiff.⁵

1. *Morgan v. Stokes*, 54 Ga. 518; *Chicago, St. L. & P. R. Co. v. Meyer*, 117 Ind. 563, 13 N. E. Rep. 576; *Firebaugh v. Stone*, 36 Mo. 111; *McDermott v. Donegan*, 44 Mo. 85; *Sheedy v. Second Nat. Bank*, 62 Mo. 17; *Dirham v. Wenger*, 14 Mo. 548; *Russell v. Hinton*, 1 Murphy (N. Car.) 468; *Jackson v. Bank of U. S.*, 10 Pa. St. 61; *Jones v. Tracy*, 75 Pa. St. 417; *Mathis v. Clark*, 2 Mill (S. Car.) Const. 456; *Ellison v. Tuttle*, 26 Tex. 283; *Britton v. Bishop*, 11 Vt. 70; *Habich v. Folger*, 20 Wall. 1.

2. *Stebbins v. Fitch*, 1 Stew. (Ala.) 180; *Earl v. Matheney*, 60 Ind. 202; *Hanna v. Luring*, 10 Martin (La.) 568; *Brode v. Firemen's Ins. Co.*, 8 Rob. (La.) 244; *Frazier v. Willcox*, 4

Rob. (La.) 517; *Field v. McKinney*, 60 Miss. 763.

If the garnishment be made at a time when the garnishee could not defend himself against a recovery, as where it was made after a verdict had been rendered against him in an action brought by the principal defendant, the garnishment will be void. *Kidd v. Shepherd*, 4 Mass. 238.

3. *Webb v. Miller*, 24 Miss. 638.

4. *James v. Fellowes*, 20 La. Ann. 116; *Featherstone v. Compton*, 3 La. Ann. 380.

5. *Fox v. Reed*, 3 Grant (Pa.) Cas. 81; *Reed v. Penrose*, 2 Grant (Pa.) Cas. 472, 36 Pa. St. 217.

When the garnishee has to defend and contest all the matters stated in

As before stated,¹ he may plead in abatement,² or in bar,³ and may rely upon the same defenses when an issue is tried on his answer. He may rely upon any plea he may have filed unless he has waived the same by answer, and he may rely upon the statute of limitations or any other legal defense which he has against the suit of his creditor.⁴

The garnishee may not only set up the defenses which he would have against an action brought by the principal defendant against him, but when there has been no personal service upon the principal defendant he may make all such defenses to the merits as he knows the principal defendant might make, if present, in defending the garnishment proceedings.⁵ However, it is only when a judgment is about to be entered against him, which judgment would be void because the court has not acquired jurisdiction over the principal defendant in the main suit, and that because thereof the main action must fail rendering the judgment to be entered in the garnishment proceeding void, that he is entitled to question the validity of the proceedings between the plaintiff and principal defendant. When no jurisdiction is acquired against the principal defendant the court is without power to enter a valid judgment against the garnishee, and the garnishee is entitled to bring this fact to the attention of the court for his own protection.⁶

his answer, he should be allowed a defense as broad as the evidence offered by the plaintiff to prove the matter put in issue. *Gage v. Wilburn*, 2 Brev. (S. Car.) 485. When the effect of the plaintiff's controversy is to attack the statement made between the garnishee and the defendant, the garnishee must be permitted to explain the title by which he holds the property sought to be seized, and the manner in which he acquired the same on settlement between himself and the principal debtor. *Hodges v. Graham*, 25 La. Ann. 365.

1. *Ante*, § 623.

2. *Donald v. Nelson*, 95 Ala. 111, 10 So. Rep. 317; *Kase v. Kase*, 34 Pa. St. 128;

Philadelphia Savings Bank v. Smet-hurst, 2 Miles (Pa.) 440; *Fitzsim-mon's Appeal*, 4 Pa. St. 248; *Stevens v. Brown*, 20 W. Va. 450; *Middleton v. White*, 5 W. Va. 572.

3. *Emerson v. Paine*, 9 Vt. 271; *Barr v. Perry*, 3 Gill. (Md.) 313.

4. *Hinkle v. Currin*, 2 Humph. (Tenn.) 137.

5. *Bushnell v. Allen*, 48 Wis. 460; *Winterfield v. Milwaukee, etc., R. R. Co.*, 29 Wis. 589.

6. *Planters', etc., Bank v. Haiman*, 80 Ga. 624; *Empire Car-Roofing Co. v. Macey*, 115 Ill. 390; *Dennison v. Blumenthal*, 37 Ill. App. 385; *Baldwin v. Ferguson*, 35 Ill. App. 393; *Johnson v. Johnson*, 26 Ind. 441;

After a judgment confessed by the principal defendant in favor of the plaintiff, the garnishee has no right to question the indebtedness of the principal defendant to the plaintiff.¹ Nor has he a right to question the validity of the service against the principal defendant if the judgment record shows that the process was returned duly executed against the defendant, who was legally before the court.² Nor can he question any other irregularity or insufficiency in the proceeding or judgment against the principal defendant, unless the objection goes to the jurisdiction of the court.³ Furthermore, the fact that the garnishee may have made a general statement in his answer as to the amount of the fund or property in his hands will not estop him from showing the correct amount upon the trial.⁴ And although he may have admitted an indebtedness in his answer, he may, on the trial of the issue, reduce the amount of the plaintiff's recovery against him by showing that another creditor has recovered a judgment in garnishment against him and that he has paid the same.⁵

He may show all defenses which are necessary and competent for the protection of his own interest, even though it be a plea of such nature as that which shows the plaintiff can not recover against the principal defendant because the proceedings are had under a law which has been repealed.⁶ He is further permitted to make all legal defenses that a claimant of the fund or property might make; but if such claimant's proposed de-

Berry v. Anderson, 2 How. (Miss.) 649; *Pope v. Hibernia Ins. Co.*, 24 Ohio St. 481; *Greene v. Tripp*, 11 R. I. 424; *Woodfolk v. Whitworth*, 5 Coldw. (Tenn.) 561; *Sun Mutual Ins. Co. v. Seeligson*, 59 Tex. 3; *Edrington v. Allsb Brooks*, 21 Tex. 186; *Glassell v. Thomas*, 3 Leigh (Va.) 113; *Beaupre v. Brigham*, 79 Wis. 436, 48 N.W. Rep. 596; *Frisk v. Reigelman*, 75 Wis. 499, 43 N.W. Rep. 1117; *Wells v. American Exp. Co.*, 55 Wis. 23.

1. *Bartlett v. Wilbur*, 53 Md. 485.

2. *Sadler v. Prairie Lodge*, 59 Miss. 572.

3. *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. Rep. 414; *Chambers v. McKee*, 1 Hill (S. Car.) 229; *Camberford v. Hall*, 3 McCord (S. Car.) 345; *Carroll v. Parkes*, 1 Baxter (Tenn.) 269; *Cowan v. Lowry*, 7 Lea (Tenn.) 620.

4. *Seymour v. Seymour*, 31 Ill. App. 227.

5. *New Orleans, M. & C. R. R. Co. v. Long*, 50 Ala. 498.

6. *Featherstone v. Compton*, 8 La. Ann. 285.

fense is cut off by laches or otherwise, the garnishee's defense in that regard will also be.¹

Waiver of garnishee by joining in the issue.—When a garnishee voluntarily joins issue and goes to trial, he thereby waives all previous irregularity in the proceedings.² He waives the objection that the plaintiff's averment improperly unites distinct causes of action,³ and, although there may have been a judgment discharging him as garnishee, if he thereafter voluntarily goes into a trial of the issue with the plaintiff he thereby waives the judgment entirely.⁴ And further, whatever objections are waived by the trial of the issue can not be raised in the appellate court.⁵

§ 661. **Supplemental or amended answer.**—Even after interrogatories have been taken *pro confesso* on *scire facias* proceedings, the garnishee may have the order set aside and be allowed to answer.⁶ The filing of a further, or amended, answer is within the sound discretion of the court.⁷ He may allow an additional answer on the garnishee's own motion,

1. Bank, etc., v. Munford, 3 Grant (Pa.) Cas. 232.

Suit pending.—A garnishee can not set up as a matter of defense at the trial that he has been summoned as garnishee in another suit, unless he also shows that a recovery was had against him in such suit. Barton v. Smith, 7 Iowa 85. He can not read, at the trial, the record of the other pending action for the same indebtedness. He should, at the commencement of the second suit, move for a stay of proceedings until the first was terminated. Marden v. Wheelock, 1 Mont. T. 49; Prentiss v. Danaher, 20 Wis. 328. Compare Wood v. Lake, 13 Wis. 94.

Can not show fraud.—As a matter of his own defense the garnishee can not take any advantage of his own fraud or the fraud of others. He can not

show that the property came into his possession by means of a fraudulent arrangement between himself and the principal defendant. Moser v. Maberry, 7 Watts (Pa.) 12. Nor can he show that the money came into his hands from conspirators in fraud, though he alleges it to be compensation for his own services. Schaffer v. Forbes, 24 La. Ann. 107.

2. Marston v. Carr, 16 Ala. 325; Rector v. Drury, 4 Chand. (Wis.) 24.

3. Union Bank v. Dillon, 75 Mo. 380.

4. Sevier v. Throckmorton, 33 Ala. 512.

5. Pulliam v. Aler, 15 Gratt. (Va.) 54.

6. Rose v. Whaley, 14 La. Ann. 374; Hanson v. Butler, 48 Me. 81.

7. Karnes v. Pritchard, 36 Mo. 135; ante, § 633.

without further interrogatories at any time before final judgment.¹

§ 662. **Judgment on trial of traverse.**—Upon a trial of the issue joined between the plaintiff and the garnishee, the court will render judgment regarding the indebtedness of the garnishee to the principal defendant, according to the evidence which has arisen from the pleadings and proof. No money judgment can be entered unless the indebtedness shows a special amount due. The fact that the answer denies an indebtedness and the proof of the traverse negatives or nullifies the answer of the garnishee will not be sufficiently specific to support a judgment for the plaintiff.²

If the evidence on the trial of the issue shows that goods belonging to the principal defendant were in the hands of the garnishee when he was served with process of garnishment, the plaintiff is at least entitled to nominal damages. But upon such proof the jury should find what property was so in the garnishee's possession, and also what was the value of such property.³ This should be done in order that if the property be not delivered or can not be found, the plaintiff may have process against the garnishee for its value.⁴

§ 663. **Same—Costs.**—On the trial of an issue between the plaintiff and the garnishee, the proceedings become adversary between them, and costs are to be paid by the one who is cast in his suit. If a greater fund or more property is found in the hands of the garnishee than he had at first disclosed, costs are to be paid by him.⁵ It has been said that although the gar-

1. *Hovey v. Crane*, 12 Pick. (Mass.) 367.

In Michigan the practice has been to allow the garnishee to be examined anew in the circuit court for the purpose of eliciting a fuller discovery when an appeal is taken from a justice's court. *Newell v. Blair*, 7 Mich. 103. This is under a practice by which the issue is tried *de novo* in the circuit court.

2. *Marks v. Reinberg*, 16 La. Ann. 348; *Pooley v. Snow*, 12 La. Ann. 814; *Templeman v. Fauntleroy*, 3 Rand. (Va.) 434.

3. *Bethel v. Linn*, 63 Mich. 464, 30 N. W. Rep. 84.

4. *Sherman v. Barrett*, 1 Rich. (S. Car.) 457.

5. *Newlin v. Scott*, 26 Pa. St. 102; *Herring v. Johnson*, 5 Phila. 443; *Hall v. Knapp*, 1 Pa. St. 213.

nishee may be discharged after a trial of such issue, yet if he have not submitted to an examination on the original action, he should be held to pay the costs.¹ Nevertheless, it is said that one who having effects of the debtor in his hands is adjudged liable to the garnishee, either upon the original suit or upon *scire facias*, is not compelled to pay the costs out of his own estate, but may satisfy the same out of the effects in his hands.² And in Vermont by force of statute it has also been held that if the garnishee be not guilty of any fraud or unnecessary delay, and have nothing in his hands for which he is chargeable, and from which he might deduct his costs, he is entitled to costs against the plaintiff.³ “Fraud or unnecessary delay,” though statutory in this case, is the rule which should govern in awarding costs against the garnishee.

1. *Jewett v. Bacon*, 6 Mass. 60.

2. *Cleveland v. Clap*, 5 Mass. 201.

3. *Hills v. Smith*, 23 N. H. (8 Fost.) 369.

That it is discretionary with the court in Vermont to allow the trustee counsel fees, see *Rollins v. Allison*, 59 Vt. 188, 10 Atl. Rep. 201.

CHAPTER XXX.

DEFENDANT'S POSITION IN THE GARNISHMENT.

§ 664. Generally.

665. May plead dilatory pleas.

666. May plead in bar.

667. Time in which he may plead.

§ 668. May claim exemptions.

669. Denial of garnishee's answer.

670. May review judgment against garnishee.

§ 664. Generally.¹—Garnishment is a species of attachment, and therefore the principal defendant can, on his own part, interpose such defenses in the garnishment suit as he could in the attachment suit if the garnishee had not been summoned. His defenses to the garnishment (attachment) are wholly distinct from his defenses to the main action, and must not be confused therewith. He has a common-law right to interpose any defense to the writ (unless otherwise controlled by statute) that he could interpose to any other writ against him or his property. He can generally make any defense except a denial of the garnishee's liability.² And in Wisconsin the statute defines his rights to be any ground that could be made available as a defense by the garnishee.³

The defendant has a right to appear in the attachment and answer, either by himself or by his counsel or both. He may do this, although he is a citizen of another state; and may take an appeal, notwithstanding the fact that no security was given for costs,⁴ unless forbidden so to do by special statute.⁵

1. *Garnishment may be dissolved by bond*.—At any time, the principal defendant has a short and sure mode by which he can dissolve an attachment. He can do this by filing a statutory bond—*ante*, §§ 302 and 286—any time before the judgment therein is satisfied. *Weber v. Carter*, 1 Phila. 221.

2. *Wales v. Muscatine*, 4 Iowa 302.

3. *Jones v. St. Ouge*, 67 Wis. 520, 30 N. W. Rep. 927; *German-American Bank v. Butler-Mueller Co.*, 87 Wis. 467, 58 N. W. Rep. 746.

4. *Reid v. Moore*, 12 Ga. 368.

5. The rule regarding a "special appearance" must be observed or the de-

§ 665. **May plead dilatory pleas.**—He may plead in abatement any defense to the writ of garnishment (attachment) in the same manner that he could plead in abatement to any other writ.¹ The truth of the facts averred in the affidavit for obtaining the writ can not be disputed by a plea in abatement;² except that the averred grounds for the issuance of the writ may be questioned to show that the court has no jurisdiction *in attachment*,³ and a plea putting in issue the truth of such facts averred in the affidavit for attachment is a plea in abatement and is waived by a subsequent plea, by the defendant, to the merits of the action.⁴ If a defendant's plea in abatement is overruled, he will waive his exception to such ruling of the court, if he pleads over or answers to the merits.⁵

A plea of "suit pending" in attachment and garnishment is not a well settled practice, because of the different degrees of effectiveness to which that suit may have attained, because of its progress, or because of the court or its jurisdiction in which the same is brought. The pendency of one attachment suit may be pleaded in abatement to another attachment suit in the same jurisdiction between the same parties.⁶ On general principles of law the court first acquiring jurisdiction will retain it to the end, and, therefore, a suit that is subsequently begun can not be pleaded in abatement; because one court having jurisdiction of the subject-matter the other can not acquire it, whether the courts be different state courts or a court of the

fendant may render himself liable to a personal judgment against him.

1. *Kirkman v. Patton*, 19 Ala. 32; *Ellison v. Mounts*, 12 Ala. 472; *Childress v. Fowler*, 9 Ark. 159; *Taylor v. Ricards*, 9 Ark. 378; *Mandel v. Peet*, 18 Ark. 236; *Scudder v. Davis*, 33 Me. 575; *James v. Dowell*, 15 Miss. (7 Sm. & M.) 333; *McDonald v. Fist*, 60 Mo. 172; *Hatry v. Shuman*, 13 Mo. 547; *Cannon v. McManus*, 17 Mo. 345; *Harris v. Taylor*, 3 Sneed (Tenn.) 536.

2. *Taylor v. Ricards*, 9 Ark. 378; *Mandel v. Peet*, 18 Ark. 236.

3. *Harris v. Taylor*, 3 Sneed (Tenn.) 536.

4. *Hatry v. Shuman*, 13 Mo. 547; *Cannon v. McManus*, 17 Mo. 345.

This is on the well known principle that a plea in abatement must be filed in apt time and is waived by a plea to the merits of the case.

5. *McDonald v. Fist*, 60 Mo. 172.

6. *James v. Dowell*, 15 Miss. (7 Sm. & M.) 333; *McKinsey v. Anderson*, 4 Dana (Ky.) 62.

United States and a state court.¹ But an attachment, or other suit, previously begun, is a proper subject for a plea in abatement.² A suit pending in another state is not the proper subject for plea in abatement, but if concluded it will be matter for a plea in bar.³ Where, however, in any case the judgment that may be entered in the present suit can not be pleaded in bar of the other suit, a court will be reluctant to enter judgment and thereby endanger the party of being subjected to double satisfaction of one demand. The technical rules regarding the conflict or agreement of jurisdiction can not be relied upon in such cases, but each case will be decided according to what will best insure substantial justice to the party over whom both judgments are pending.

A plea *puis darrein continuance* has been held to be sufficient to stay the proceedings in the garnishment suit until the termination of another suit pending in the same court.⁴

§ 666. **May plead in bar.**—The plaintiff may interpose a plea in bar, and set up any matter to defeat the garnishment that he might set up to defeat a direct attachment under the same circumstances. Another attachment, garnishment or other suit may be pleaded in bar when the defendant or garnishee is thereby bound to make satisfaction, and the judgment in the present suit will not supersede the judgment in that suit;⁵ but the fact that the third person has attached the property in a suit against the plaintiff can not be pleaded in bar before there has been a recovery by such third person.⁶

1. Custer v. White, 49 Mich. 262; Greenwood v. Rector, Hemp. Cir. Ct. (U. S.) 708.

2. Wallace v. McConnell, 13 Peters (U. S.) 136.

It has been held that a person, being the creditor of another, and a debtor of a third person, may attach the funds in his own hands which belong to the other person and then plead the pending attachment in a suit brought against him by the third person. Grayson v. Veeche, 12 Martin (La.) 688.

3. Garity v. Gigie, 130 Mass. 184; *post*, § 666.

4. Smith v. Carrol, — R. I. —, 21 Atl. Rep. 343.

5. Killsa v. Lermond, 6 Me. 116; Moyer v. Lobengeir, 4 Watts (Pa.) 390; Maynard v. Nekervis, 9 Pa. St. 81; State Bank v. Seaman, 8 Blackf. (Ind.) 181. See, also, Gibson v. Scull, Hempst. 36.

6. Pierson v. McCahill, 21 Cal. 123; Nevins v. Rockingham, M. F. I. Co., 5 Foster (N. H.) 22; Sims v. Talbot, 27 Miss. 487.

The pendency of a prior attachment is not a bar to the present suit,¹ but it may be proper subject-matter for continuance or abatement.² If, however, there has been a binding judgment in the prior suit, although it may have been rendered by a court in another state, it may be pleaded in bar to an attachment or garnishment in this state.³

§ 667. **Time in which he may plead.**—Unless otherwise prevented by the force of a special statute, the defendant may interpose his defenses at any time before judgment is entered in the attachment, but his pleadings will be governed by the common law rules regulating the order in which his pleas shall be filed. That is to say he must plead to the jurisdiction before he pleads in abatement, and must plead in abatement before he pleads in bar, unless the subject-matter for abatement arises after the commencement of the suit.⁴ By force of statute, however, in Florida, a defendant in attachment has at all times, up to the trial of the suit on its merits, a right to contest the plaintiff's right to have attachment, and this he may do even after pleading to the action.⁵

§ 668. **May claim exemptions.**—The defendant may interpose a claim that the property sought to be charged by garnishment is exempt from execution and attachment, and in fact if he has himself been brought into court by the personal service of process, he must interpose a claim of exemption, or it will be deemed to have been waived; for, as hereinbefore stated, when he is personally served, the garnishee is under no obligation to interpose a claim of exemption for him.⁶ Further-

1. *Marsh v. West, etc., Mfg. Co.*, 46 N. Y. Sup. Ct. 8.

2. *Supra*.

3. *Garity v. Gigie*, 130 Mass. 184.

4. 1 Chitt. Pl. 441; *Manuel v. Mississippi*, 2 Miles (Pa.) 398; *Lindsley v. Malone*, 23 Pa. St. 24.

The defendant in a case of foreign attachment can not, after having failed in a motion to quash the writ,

file a special plea raising the question of residence along with other pleas in bar. *Lindsley v. Malone*, 23 Pa. St. 24.

A plea *puis darrien continuance* may be interposed whenever the occasion therefor arises.

5. *Kennedy v. Mitchell*, 4 Fla. 457.

6. *Ante*, § 629.

more, it is said in Iowa that the only defense which the defendant can make to the liability of the garnishee on the indebtedness is a defense in the nature of a claim of an exemption; for any denial of indebtedness or liability must be interposed by the garnishee himself.¹ The time at which the defendant's claim of exemption must be interposed may be regulated by special statute. In Pennsylvania the defendant's claim of exemption is in apt time if filed at the time the garnishee's answer is filed.² In any event, if the claim of exemption is not interposed before judgment in favor of the attaching creditor against the garnishee, the exemption is lost, for it can not thereafter be asserted.³

§ 669. Denial of garnishee's answer.—If the defendant is dissatisfied with the answer that is filed by the garnishee, he has the right to protect himself by some proper procedure in objection thereto prosecuted within the proper time.⁴ It is said that the proper mode of procedure in such a case is for the defendant to deny the correctness of the garnishee's answer upon oath and to file an instrument like a declaration suggesting the nature of the garnishee's indebtedness to which the garnishee may plead. If then judgment is thereon entered against the garnishee, it will be one of condemnation to satisfy the garnishment plaintiff's demand.⁵

Since the defendant on account of his interest will not generally be admitted as a witness on behalf of the garnishee, but on account of his adverse interest he may be admitted on the part of the plaintiff.⁶ The attachment defendant can not deny the indebtedness of the garnishee, or maintain that it is not due;⁷ but he may establish the indebtedness of the garnishee to him.⁸ And for a like reason the garnishee who has not

1. *Wales v. Muscatine*, 4 Iowa 302.

2. *Kuhn v. Warren Savings Bank*, (Pa.) 11 Atl. Rep. 440.

3. *Randolph v. Little*, 62 Ala. 396.

4. Contesting the defendant's answer at the term in which the same is filed is apt time.

5. *Graves v. Cooper*, 8 Ala. 811.

6. *Ante*, § 656.

7. *Bacon v. Masters*, 2 Root (Conn.) 43; *Doty v. Reed*, 2 Root (Conn.) 81; *Burrows v. Lehndorff*, 8 Iowa 96.

8. *Edwards v. Temple*, 2 Harr. (Del.) 322.

yet filed his answer is not an admissible witness for the defendant.¹ Because of the defendant's adverse interest, he can give evidence of the good character of the garnishee when it is sought to annul her title to the goods in her possession on the ground of fraud.²

§ 670. **May review judgment against garnishee.**—The principal defendant in a garnishment proceeding, if he be dissatisfied with the judgment entered in the garnishment against the garnishee, may appeal from the decision of the court,³ or he may file exceptions to the rulings of the court and have the same reviewed on writ of error in the court above.⁴

1. *White v. Means*, 33 Me. 495.

4. *Huriburt v. Hicks*, 17 Vt. 193.

2. *Dawkins v. Gault*, 5 Rich. (S. Car.) 151. Further as to "Judgment," § 678 *et seq.*, and "Review of Garnishment,"

3. *Reid v. Moore*, 12 Ga. 368.

see *post*, § 699 *et seq.*

CHAPTER XXXI.

INTERPLEA IN GARNISHMENT.

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| § 671. Necessity for bringing in the claimant. | § 675. When, where and how the issue should be tried. |
| 672. Summoning or citing the claimant. | 676. The evidence—Burden of proof. |
| 673. The duty of the plaintiff. | 677. The judgment—Costs. |
| 674. The issue on the interplea. | |

§ 671. **Necessity for bringing in the claimant.**—The general rules and principles governing the intervention of claimants in all attachment suits have been hereinbefore laid down.¹ And the following paragraphs will be devoted to the treatment of the subject when it is disclosed by the garnishee that he has property or funds in his possession, and that the same have been assigned to or are claimed by another person not a party to the suit. It has been before stated² that the garnishee must disclose in his answer all existing liens and assignments, or he will not himself be protected by a judgment in garnishment against him; nor will he discharge his duty to the owner or claimant of such fund or property.³ It has also been shown that no judgment can be entered against a garnishee on an answer that does not admit an indebtedness to the principal defendant.⁴ Therefore, when it is shown that a stranger to the suit claims an interest, by assignment or otherwise, in the fund admitted to be in the hands of the garnishee, and such interest is not admitted or definitely shown, no judgment of condemnation against the fund so in the hands of the garnishee can be rendered in favor of the plaintiff in the garnish-

1. *Ante*, Vol. I, §§ 426-440.

2. *Ante*, §§ 627, 628.

3. *Schempp v. Fry*, 165 Pa. St. 510, 30 Atl. Rep. 941.

4. *Ante*, § 638.

ment. A stranger must be within the power of the court. His rights can not be ignored. He must be brought in in the manner prescribed by statute or come in voluntarily, or no judgment can be entered against him. Without his day in court his claim can not be treated adversely, and no valid judgment can be entered against the garnishee because of the uncertainty.¹ If the garnishee is in doubt as to who is his creditor, he can show all persons interested and they may be brought in.² But the fact that the answer makes it inferable that a stranger claims the fund, and that he has been notified, will not alone warrant a judgment against the garnishee. The plaintiff can contest the answer and submit the question to a jury.³ Furthermore, the garnishee will be discharged where he has disclosed a claimant of the fund in his possession, although such claimant refuse to appear.⁴ An indebtedness of the garnishee must appear with reasonable certainty.⁵

§ 672. **Summoning or citing the claimant.**—It is provided by almost every statute that when a garnishee makes it to appear that the fund which he admits to have in his possession is claimed by a stranger to the proceedings, by assignment or otherwise, the court will suspend the proceedings and award an interpleader; and such stranger may be cited, or summoned, or given notice to appear and assert his claim thereto in pain of having judgment entered against him by default if

1. *Edwards v. Levisohn*, 80 Ala. 447, 2 So. Rep. 161; *Simmons v. Guyon*, 57 Ala. 111; *Molton v. Escott*, 50 Ala. 77; *Mobile and Ohio R. R. Co. v. Whitney*, 39 Ala. 468; *Marston v. Carr*, 16 Ala. 325; *Payne v. Mayor*, 4 Ala. 333; *Look v. Brackett*, 74 Me. 347; *Jordan v. Harmon*, 73 Me. 259; *Kennedy v. McLellan*, 76 Mich. 598, 43 N. W. Rep. 641; *Levy v. Miller*, 38 Minn. 526, 38 N. W. Rep. 700.

2. *Wimer v. Pritchett*, 16 Mo. 252.

He must, however, do this in apt time. He can not do so after the adjudication of other claimant's rights

on interpleader. *Providence Inst. for Savings v. Barr*, 17 R. I. 131, 20 Atl. Rep. 245; *Russell v. Thayer*, 30 Vt. 525.

Third person may disclaim.—When a garnishee's answer shows that he believes the fund which he admits to be in his hands belongs to a third person, who is named, such third person may appear and file a disclaimer, and the garnishee will then be chargeable. *Mortland v. Little*, 137 Mass. 339.

3. *Fortune v. State Bank*, 4 Ala. 385.

4. *Cram v. Shackleton*, 64 N. H. 44, 5 Atl. Rep. 715.

5. *Ante*, §§ 640, 643.

he do not.¹ Most statutes relating to interpleas are directory

1. *Edwards v. Levinshon*, 80 Ala. 447; *Ex parte Opdyke*, 62 Ala. 68; *Easton v. Lowery*, 29 Ala. 454; *Camp. v. Hatter*, 11 Ala. 151; *Hair v. Northwestern Nat. Bank*, 50 Ill. App. 211; *Parker v. Wright*, 66 Me. 392; *Holland v. Smit*, 11 Mo. App. 6; *Gates v. Kerby*, 13 Mo. 157; *Funkhouse v. How*, 24 Mo. 44; *Dickey v. Fox*, 24 Mo. 217; *Stern v. Jones*, (Pa. Com. Pl.) 7 Kulp. 19.

If judgment be wrongfully entered against the garnishee it will not bar the claimant from thereafter recovering against such garnishee. *Edwards v. Levinshon*, 80 Ala. 447. He must be brought within the court, so that a judgment thereof will bar him from its subsequent action.

The Wisconsin statute limits the cases in which the court may order the claimant to file an interplea to those cases in which the defendant's answers show that another person than the defendant "claims" the property or fund which the garnishee admits he owes; and is not applicable in cases where he shows that the property or fund "belongs to" or "was the property of" such person. *John R. Davis Lumber Co. v. First Nat. Bank*, 87 Wis. 435, 58 N. W. Rep. 743.

Claimant may be admitted on his own application.—One who, by the garnishee's answer, is shown to be a claimant of the property, may be permitted to appear and be made a party to the proceeding—*Crone v. Braun*, 23 Minn. 239; *Skinner v. Thompson*, 21 Mo. 15; *Wolff v. Vette*, 17 Mo. App. 36—upon such terms as the court may order. *Webster v. Farnum*, 60 N. H. 288. But a claimant has no standing in court except under an order of such court. *Rowell v. Felker*, 54 Vt. 526. He must be a party. *Dyer v. Webster*, 18 N. H. 417.

No one but a claimant can be an interpleader.—The defendant in the attachment suit can not be admitted as an interpleader—*Ellis v. Clarke*, 19 Ark. 420; nor can the garnishment plaintiff, together with a plaintiff in another garnishment. Only the one claiming to "own" the property will be admitted under the Missouri statute. *Abernathy v. Whitehead*, 69 Mo. 28.

Garnishee may interplead for claimant in Illinois.—By force of a special statute in Illinois the garnishee has the right to interplead for those to whom the fund belongs and protect the same for them. *Meadowcroft v. Agnew*, 89 Ill. 469.

Claimant may interplead though not disclosed.—One who claims to be the assignee of a fund which has been garnished in the hands of another, may interplead and have his rights determined, although the garnishee's answer does not disclose that he is such a claimant. *Dennis v. Twitchell*, 10 Metc. (Mass.) 180. He has the same right to come and prove his interest that one has who claims specific property attached. *Kean v. Doerner*, 62 Md. 475; *ante*, § 427.

Claimant must interplead in apt time.—A claimant, with notice of the garnishment of the property or fund, should intervene before judgment has been rendered against the garnishee, *Ferrall v. Farnen*, 67 Md. 76, 8 Atl. Rep. 819; *Lawrence Bank v. Raney & Berger Iron Co.*, 77 Md. 321, 26 Atl. Rep. 119; *Shultz v. Hoffman*, (Pa. Com. Pl.) 13 Pa. Co. Ct. Rep. 90, and must do so before the fund is paid over to the plaintiff. *Edwards v. Cosgro*, 71 Iowa 296, 32 N. W. Rep. 350; *Dodds v. Gregory*, 61 Miss. 351.

In Georgia, the garnishee, in his answer, must protect the claimant. The claimant is at his option whether

and intended to be resorted to for the benefit of all parties.¹ It has been said that when such a claimant is disclosed, the court should require him to appear and state the nature of his claim, and to either maintain or relinquish it;² but, on the contrary, it is stated that the court can not, of its own motion, require an intervention.³ If such stranger be *not* brought in, or come in voluntarily, his rights can not be adjudicated, and the garnishee will be discharged because of a failure to show himself to be liable to the defendant.⁴

Remedy in equity.—Where the number of independent claimants to a fund that was sought to be subjected in garnishment was so large that their several rights could not be satisfactorily tried in an issue at law, the court remitted the parties to a court of equity.⁵

§ 673. **The duty of the plaintiff.**—The garnishee having filed an answer disclosing the fact that the fund has been assigned, or was claimed by a stranger to the suit, it is the duty of the plaintiff to controvert a claim of such person by bringing him in to establish or relinquish the same, for if it is not done within a reasonable time, the garnishee has a right to be discharged.⁶ If the plaintiff wants to dispute the claim, or assignment, for want of consideration, for fraud, or any other reason, he should bring the principal claiming to hold as assignee, or otherwise, before the court so that he may be bound by the judgment upon the trial of the issue.⁷ If he do not, there is no binding adjudication of such person's claim.⁸

Furthermore, after a claimant, who is a stranger to the suit, has been disclosed by the answer, and by due process of law is

he intervene. Intervention is not an exclusive remedy. *Rutherford v. Fullerton*, 89 Ga. 353, 15 S. E. Rep. 471.

1. *McKittrick v. Clemens*, 52 Mo. 160.

2. *Chesapeake, etc., R. R. Co. v. Paine*, 29 Gratt. (Va.) 502.

3. *Marx v. Parker*, 9 Wash. 473, 37 Pac. Rep. 675.

4. *Ante*, § 643.

5. *Wilbraham v. Horrocks*, 14 Phila. (Pa.) 191.

6. *Donald v. Nelson*, 95 Ala. 111, 10 So. Rep. 317; *Mock v. King*, 15 Ala. 66; *Goodwin v. Brooks*, 6 Ala. 836; *Cadwalader v. Hartley*, 17 Ind. 520; *Look v. Brackett*, 74 Me. 347.

7. *Cadwalader v. Hartley*, 17 Ind. 520.

8. *Look v. Brackett*, 74 Me. 347.

caused to be an intervener, the plaintiff must try the issue raised between himself and such stranger, within a reasonable time, or he will be deemed to have abandoned the pursuit of the garnishment, and both the claimant and the garnishee will be discharged.¹

§ 674. **The issue on the interplea.**—When a garnishee has disclosed by his answer that the fund or property, which he admits to be in his possession, has been assigned, or is claimed by a stranger to the suit, and such stranger has been brought in, or has voluntarily appeared, a separate and distinct issue is then made up between the attaching creditor and such third person. In the trial of this issue the court or jury is limited to determine whether such claimant is or is not entitled to the money or property. It is wholly a collateral issue and the claimant can not question the regularity or sufficiency of the garnishment proceedings. He can not question the validity of the plaintiff's demand against the defendant, for these are matters personal to such defendant and if they are waived by him can be questioned by no other person. Neither can he question the plaintiff's right to charge the garnishee. He can not dispute the indebtedness of the garnishee, nor show that there were no goods in the garnishee's possession. He is confined to matters relating to the validity and priority of his title. The question is not whether the property belongs to the defendant, but whether it belongs to the claimant, and the claimant if he recover at all must recover on the strength of his own right.² It is of the same nature as an issue between

1. *Goodwin v. Brooks*, 6 Ala. 836.

2. *Ex parte Opdyke*, 62 Ala. 68; *Salter, etc., Co. v. Insurance Co. of North America*, 62 Ala. 221; *Clark v. Few*, 62 Ala. 243; *Winslow v. Bracken*, 57 Ala. 368; *Fleming v. Shields*, 21 La. Ann. 118; *Dalton v. Dalton*, 48 Me. 42; *Clark v. Gardner*, 123 Mass. 358; *Segee v. Downes*, 143 Mass. 240, 9 N. E. Rep. 565; *Moors v. Goddard*, 147 Mass. 287, 17 N. E. Rep. 532; *Pecard v. Home*,

91 Mich. 346, 51 N. W. Rep. 891; *Tupper v. Cassell*, 45 Miss. 352; *Lindau v. Arnold*, 4 Strobb. (S. Car.) L. 290; *Teichman Commission Co. v. American Bank*, 27 Mo. App. 676.

Claimant may sue out an injunction.—While the claimant can not question the regularity of the plaintiff's proceedings, yet he may have an injunction and prevent the attachment. *Romagosa v. Nodal*, 12 La. Ann. 341.

the plaintiff and the intervener in any other attachment suit.¹

The issue between the plaintiff and the interpleader is wholly distinct and independent from the attachment proceedings themselves, and if the claim suit is taken up for review the upper court will not look into the attachment proceedings for the purpose of finding error, unless the record of the attachment has been in some legitimate way introduced into the claim suit.²

Furthermore, the garnishee is not a party to the suit between the plaintiff and the claimant, and it is error to make him so, where he has admitted a liability to some one and expressed his readiness to pay the same to the plaintiff or claimant, as the court might adjudge.³

The issue on the trial of an interpleader is strictly at law, yet where an alleged conveyance is attacked as being in fraud of creditors, the issue, although of an equitable nature, should nevertheless be tried by the court in which the proceedings are pending.⁴

§ 675. When, where and how the issue should be tried.—Like the trial of the intervener's right in any other attachment suit,⁵ the issue upon the interplea between the claimant and the plaintiff in garnishment, should, as a matter of convenience and necessity, be tried and determined by the court before proceeding to adjudicate the matters in dispute between the other parties.⁶ The issue in the claim suit must be tried in the same court in which the garnishment (attachment) suit has been instituted.⁷ And the issue in the claim suit will be tried on the evidence produced by the claimant and the plaintiff in garnishment.⁸

1. *Ante*, § 429.

2. *Gray v. Raiborn*, 53 Ala. 40.

3. *Fish v. Keeney*, 91 Pa. St. 138.

4. *Whitney-Holmes Organ Co. v. Pettitt*, 34 Mo. App. 536.

5. *Ante*, §§ 430-434.

6. *Ladd v. Couzins*, 35 Mo. 513; *People v. Stitt*, 7 Ill. App. 294.

7. *Thompson v. Evans*, 12 Ala. 588.

8. *Leslie v. Godfrey*, 55 Minn. 231, 56 N. W. Rep. 818.

The statute providing that the claim suit should be heard by a commissioner, and providing that the claimant should be notified "of the time and place of such hearing" only re-

§ 676. **The evidence—Burden of proof.**—The interpleader in an attachment or garnishment suit stands in the position of a plaintiff or complainant to assert his right, and, therefore, must file the initiatory pleas, but has the affirmative in maintaining his right as such claimant. The burden is upon the interpleader to show that he is an assignee or other person entitled to the fund or property in the hands of the garnishee, which he claims, and unless he establish the same to the satisfaction of the court, judgment will go against him and in favor of the plaintiff.¹ He is not, however, necessarily confined in his proof to facts that have been disclosed by the garnishee, but may introduce proof of other facts not within his knowledge. He may even show collusion between him and the plaintiff or defendant.²

The plaintiff may introduce in evidence that which will tend to prove that the transfer from the principal defendant to the claimant is not valid as to him (the attaching creditor); and in order to do this it is not first necessary for him to allege that he is the creditor of the defendant and has attached the property by garnishment, these facts having already been alleged in the initiatory garnishment proceedings.³ The plaintiff may examine the claimant regarding the consideration of the transfer, the manner of payment, etc., for the purpose of showing fraud, in the same manner as he may cross-question the defendant in other cases.⁴ He may show that the claimant knew that he was seeking to hold the funds in the hands of the garnishee, and that the assignment under which the interpleader claims was not made in good faith or for a good consideration.⁵

quires notice to the persons who have entered into the cause as such, in accordance with the provisions of the statute and not to persons holding by a fraudulent or fictitious transfer, who are without the jurisdiction of the court. *Wheeler v. Winn*, 38 Vt. 122.

1. *Bergman v. Sells*, 39 Ark. 97; *Poole v. Carhart*, 71 Iowa 37, 32 N. W. Rep. 16; *Haynes v. Thompson*, 80 Me. 125, 13 Atl. Rep. 276; *Smith v.*

Barclay, 54 Minn. 47, 55 N. W. Rep. 827.

2. *Andrews v. Herring*, 5 Mass. 210.

3. *Smith v. Barclay*, 54 Minn. 47, 55 N. W. Rep. 827.

4. *Howard v. Oppenheimer*, 25 Md. 350.

5. *Sullivan v. Langley*, 124 Mass. 264.

And upon this issue, for this purpose, an agreement between the inter-

However, whether or not the assignment was upon a sufficient consideration, does not concern the plaintiff where the claimant holds under one he had acquired all the defendant's rights to the funds in possession of the garnishee.¹ And upon the trial of such an issue the principal defendant is a competent witness for the plaintiff regarding the right and title of the claimant.²

Waiver and estoppel.—After the issue has been tried between the plaintiff and the claimant who has been disclosed by the garnishee's answer, the plaintiff can not then object that the garnishee's answer was not filed in time, or was not verified.³ Nor can he then object that the claimant was not formally made a party to the suit.⁴

Likewise a claimant who has filed a plea to the jurisdiction of the court which has been overruled will be deemed to be a stranger to the record if he makes no further prosecution of his claim in the manner prescribed by statute.⁵ Nor, after a judgment on the merits and suing out a *certiorari* to review the same, can he object that the plaintiff's traverse was not filed in due time.⁶

677. The judgment—Costs.—In a case where an issue is tried upon the interpleader's claim the record must show that an issue was made up between the attachment plaintiff and the claimant.⁷ When the evidence has shown that the claimant is entitled to the whole of the fund, judgment of course will be entered for him against the plaintiff. Where a part only of the fund is shown to belong to the interpleader, judgment will be rendered in his favor for the amount.⁸ And where the in-

venter and garnishee, made prior to the garnishment regarding the possession and sale of the property or application of the proceeds, is relevant. *Ripley v. Ayer*, 119 Ill. 341, 9 N. E. Rep. 894.

1. *Marks v. Anderson*, 1 Colo. App. 1, 27 Pac. Rep. 168.

2. *Cadwalader v. Hartley*, 17 Ind.

520; *Amoskeag Mfg. Co. v. Gibbs*, 28 N. H. 316.

3. *Kirby v. Corning*, 54 Wis. 599.

4. *Cornish v. Russell*, 32 Neb. 397, 49 N. W. Rep. 379.

5. *Gates v. Tusten*, 89 Mo. 13.

6. *Pedrick v. McCall*, 80 Ga. 491, 5 S. E. Rep. 633.

7. *Tupper v. Cassell*, 45 Miss. 352.

8. *Kirby v. Corning*, 54 Wis. 599.

tervener's claim is for so much of the fund as is necessary to satisfy the debt when that amount is established by proof, judgment should be entered in his favor therefor and for the plaintiff for the balance.¹ Where the interpleader has been properly brought within the jurisdiction of the court and he fails to appear and establish his claim, judgment should be entered in favor of the plaintiff against the garnishee for the amount admitted to be in his hands.²

Costs will be awarded to the claimant if he succeeds in establishing a claim to a part of the fund only,³ as well as if he establishes his right to the whole.⁴ He is entitled to the same costs when he succeeds on the merits that would be allowed to a defendant.⁵ If the plaintiff prevail costs will be awarded to him against the claimant. Costs will be taxed against the claimant, in such a case, from the time he appeared in the suit.⁶

No costs will be assessed against the garnishee on the trial of an interpleader when he has made no claim to the property and has made no default.⁷

An appeal will lie to a superior court from the decision of an inferior court upon an interplea concerning the effects or property in the possession of the garnishee.⁸ It may be prosecuted by one who has been recognized as a party and has had his rights adjudicated.⁹

1. *Whalen v. McMahon*, 16 Colo. 373, 26 Pac. Rep. 583.

2. *Saller, etc., Co. v. Ins. Co.*, 62 Ala. 221; *Fish v. Keeney*, 91 Pa. St. 138; *Chesapeake, etc., R. R. Co. v. Paine*, 29 Gratt. (Va.) 502.

Appeal.—The claimant under the Michigan statute is held to have the same right to appeal that a garnishee has. *Pecard v. Home*, 91 Mich. 346, 51 N. W. Rep. 891.

3. *Kirby v. Corning*, 54 Wis. 599.

4. *Ante*, § 440.

5. *Mahoney v. McLean*, 28 Minn. 63.

6. *Peabody v. Maguire*, 79 Me. 572, 12 Atl. Rep. 630.

7. *Fish v. Keeney*, 91 Pa. St. 138; *Tupper v. Cassell*, 45 Miss. 352.

8. *Smith v. Sterritt*, 24 Mo. 260.

9. *Sheldon v. Hinton*, 6 Ill. App. 216.

CHAPTER XXXII.

JUDGMENT IN GARNISHMENT.

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| <p>§ 678. Record of. (a) Separate from judgment in principal action.</p> <p>679. (b) Must show that court had jurisdiction.</p> <p>680. No judgment unless prior steps be valid and sufficient.</p> <p>681. No judgment against garnishee before judgment against defendant.</p> <p>682. Same—Effect of death.</p> <p>683. Judgment by default—Judgment <i>nisi</i>.</p> <p>684. Judgment on <i>scire facias</i>.</p> <p>685. Judgment charging garnishee.
(a) On answer showing liability.</p> <p>686. (b) When a fund—The amount.</p> <p>687. (c) When property—The surrender.</p> <p>688. (d) When upon note in circulation.</p> | <p>§ 689. (e) When interest to be included.</p> <p>690. (f) When indebtedness not yet payable.</p> <p>691. (g) Regarding the form of the judgment.</p> <p>692. (h) Regarding personal judgment.</p> <p>693. (i) Regarding liability to the defendant and another.</p> <p>694. Judgment discharging the garnishee.</p> <p>695. Judgment in garnishment not a lien.</p> <p>696. Judgment gives plaintiff the rights defendant had.</p> <p>697. Judgment on bond given to dissolve garnishment.</p> <p>698. Costs, for or against the garnishee.</p> |
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§ 678. Record of—(a) Separate from judgment in principal action.—Garnishment being a species of attachment and therefore only an ancillary or provisional remedy,¹ it follows naturally that a judgment in garnishment is dependent upon a judgment in the action to which the proceeding in garnishment is an aid. A judgment in garnishment is in general governed by the rules relating to other judgments in attachment as hereinbefore shown,² and what is here stated is in-

1. *Ante*, Vol. I, § 3, *et seq.*; Vol. II, §§ 465-467. 2. *Ante*, Vol. I, §§ 449-455.

tended only to be supplemental thereto in so far as a judgment in garnishment differs from other judgments in attachment.

Garnishment in its nature and proceeding is so much a separate suit that a separate record thereof is generally required, which separate record shall show only the proceedings against the garnishee and contain an entry of judgment, as in ordinary cases.¹ Where there are several garnishees in the same suit, a separate record of the proceedings should be kept for each of them, but a failure so to do is a mere irregularity and will not of itself invalidate a judgment in the garnishment proceedings otherwise regular.²

§ 679. (b) Must show that court had jurisdiction.—The record of the judgment in garnishment must make it affirmatively to appear that the court had jurisdiction. All the facts necessary to authorize the judgment must be shown by a recital of sufficient of the proceedings to make that fact appear.³ It must show that the proceedings were legally begun,⁴ and must show that the court acquired jurisdiction of the fund or property in the hands of the garnishee.⁵ And it must show how notice was given to the garnishee.⁶ The writ should ap-

1. *Atchinson v. Rosalip*, 4 Chand. (Wis.) 12; *Fasquelle v. Kennedy*, 55 Mich. 305.

In Michigan the statute stating that garnishment proceedings in a justice's court "may be entered on the docket as suits in other cases," is not mandatory, but permissive, and judgment, if otherwise sufficient, will not be invalid, because it differs in its entry from that commonly made. *Fasquelle v. Kennedy*, 55 Mich. 305.

2. *Cohn v. Tillman*, 66 Tex. 98, 18 S. W. Rep. 111.

3. *Wells v. American Express Co.*, 55 Wis. 23; *Haynes v. Gates*, 2 Head. (Tenn.) 598; *Wallen v. McHenry*, 10 Yerg. (Tenn.) 310, 314.

4. *Carper v. Richards*, 13 Ohio St. 219.

If a justice's docket fail to contain

an entry at length of the affidavit on which the proceedings were instituted, or to state the nature thereof, it does not render subsequent proceedings illegal, and although it name such affidavit as the "affidavit for proceedings against S. as garnishee," it will be presumed to have contained a legal cause for attachment, and although it contain no mention of a bond and does not show the summons to have been returned "not found," the non-residence of the defendant as a ground for attachment will be presumed to have been stated in the affidavit. *Carper v. Richards*, 13 Ohio St. 219.

5. *Keane v. Bartholow*, 4 Mo. App. 507.

6. *Meyer v. Keith*, 99 Ala. 519, 13 So. Rep. 500; *Johnson v. Layton*, 5 Harr.

pear in the record.¹ And it must be shown that the statute has been followed in every respect.² The record must contain a description of the cause of action, the same as in other cases.³ And when judgment is rendered against the firm by default, the names of the persons composing the firm must appear in the record, or it will be reversed.⁴ It is not necessary that the answer should appear in full upon the record, but it should be a part thereof, and referred to in the judgment. If it is found in the transcript and identified by the minute entry, it will be considered as a part thereof.⁵ The execution of the bond in the clerk's office and the approval of it by him and filing of the same, together with the affidavit in his office before attachment issued, need not be recited in the judgment entry. These are facts which appear by the certificate of the clerk on the papers, or may be proved by the clerk, or otherwise, like other facts.⁶

Where garnishment is a proceeding in aid of an execution, that is to say, where it is resorted to for the purpose of enforcing the satisfaction of a judgment theretofore entered in favor of the plaintiff against the principal defendant, the record should consist only of the affidavit and summons, the return of the officer "no property found," the answer of the garnishee, and the judgment rendered thereon against him. It has been held that neither the judgment against the original debtor nor the execution issued thereon is a part of the record

(Del.) 252; *Brinsfield v. Austin*, 39 Ala. 227; *Vairin v. Edmonson*, 10 Ill. (5 Gilm.) 270; *Saffarans v. Terry*, 20 Miss. (12 Smed. & M.) 690; *Carleton v. Washington Ins. Co.*, 35 N. H. 162.

1. *Wilson v. Hickson*, 1 Blackf. (Ind.) 230.

2. *Willets v. Ridgway*, 9 Ind. 367.

If the record shows that the affidavit or petition was filed and the writ issued on the same day, it will be presumed that the writ issued after the filing of the petition. *Pitkins v.*

Boyd, 4 Greene (Iowa) 255; *Nuckols v. Mitchell*, 4 Greene (Iowa) 432.

3. *Harlow v. Beektle*, 1 Blackf. (Ind.) 237.

4. *Reid v. McLeod*, 20 Ala. 576.

5. *Wyman v. Stewart*, 42 Ala. 163; *Jones v. Howell*, 16 Ala. 695.

Where a garnishee answer and then again answer further on special interrogatories, and in such answer refer to the former answer, both are considered as part of the record. *Wicks v. Branch Bank*, 12 Ala. 594.

6. *Simpson v. Minor*, 1 Blackf. (Ind.) 229. •

of the garnishment suit, unless it has been incorporated into the judgment against the garnishee or made a part of the record by a bill of exceptions.¹ But by the prevailing rule, a judgment against a garnishee which does not recite the fact and amount of the judgment which has been rendered against the defendant, is defective.² The fact of the entry of judgment being necessary to jurisdiction in garnishment proceedings in aid of execution, the fact should undoubtedly in some manner appear upon the record.

Where the record shows the affidavit on which the attachment was based, such affidavit being a part of the record, any insufficiency therein will be apparent, although the record also recite the making of an affidavit according to law. If, then, such affidavit were not sufficient on which to found an attachment, all the proceedings thereon are void.³

If there has been an interpleader, the record must show that an issue has been tried between the claimants and the plaintiff, which issue is only the trial of the "right" of the intervening claimant to the fund or property sought to be reached by the attaching creditor.⁴ This issue is separate from any of the issues between any of the other parties, and a record thereof should also show that fact separately.⁵

§ 680. No judgment unless prior steps be valid and sufficient.—The rendering of judgment against the garnishee is dependent upon the court having obtained jurisdiction in two instances. The court must have acquired jurisdiction over the principal defendant in order that it may enter judgment against him in favor of the plaintiff, and it must have acquired jurisdiction over the garnishee, in order that the fund or property in his hands may be appropriated to the satisfaction of the judgment rendered against the principal defendant. If the

1. *Gunn v. Howell*, 27 Ala. 663.

2. *Brake v. Curd-Sinton Mfg. Co.*, 102 Ala. 339, 14 So. Rep. 773; *Chambers v. Yarnell*, 37 Ala. 400; *Jackson v. Shipman*, 28 Ala. 488; *Case v. Moore*, 21 Ala. 758.

3. *Maples v. Tunis*, 11 Humph. (Tenn.) 108.

4. *Tupper v. Cassell*, 45 Miss. 352.

5. *Ante*, §§ 674-677.

principal defendant is or has been personally before the court, either because of personal service having been made upon him or of his having appeared generally, the jurisdiction to enter judgment against him *in personam* is or has been acquired, and the only further requisite is that the court have obtained jurisdiction to condemn the fund or property in the hands of the garnishee. But if, as in the case of non-residence of the defendant, the court have not acquired jurisdiction over the principal defendant personally, then jurisdiction of the garnishee, and the fund or property in his possession, is necessary, both for the purpose of condemning the fund or property in the possession of the garnishee and for rendering a judgment *in rem* to that amount against the principal defendant. If the defendant is or was personally before the court, a valid general judgment may be or may have been entered against him, and then, if the garnishee is properly before the court, judgment may be entered against him; but if such valid personal judgment has not been rendered against the principal defendant, no judgment can be rendered against the garnishee, even though he be within the jurisdiction of the court, unless it be shown that by acquiring jurisdiction over the garnishee, the court has acquired jurisdiction over the fund or property in his hands. In this case judgment *in rem* can be rendered against the property of the principal defendant, and the plaintiff's demand against him satisfied to that extent, and the garnishee held liable to the full amount of the fund or property. If the court have not acquired jurisdiction over the principal defendant, and there is no fund or property in the possession of the garnishee, there is no subject-matter on which the jurisdiction of the court may be exercised, and the proceedings must wholly fail. If a judgment should be entered in such a case, it, and all proceedings under it, would be wholly void and could be attacked collaterally.¹

1. *Eaton v. Badger*, 33 N. H. 228; (Mass.) 483; *Downs v. Fuller*, 2 Morse v. Presly, 25 N. H. 299; *Young Metc.* (Mass.) 135; *Leonard v. Bryant*, 31 N. H. 201; *Elliott v. Peirsol*, 11 Metc. (Mass.) 370; *Lawrence v. Ware*, 1 Stew. (Ala.) 33; *Shep-*

§ 681. No judgment against garnishee before judgment against defendant.—The sole object of a proceeding by garnish-

pard *v. Powers*, 50 Ala. 377; *Jennings v. Pearce*, 101 Ala. 438, 14 So. Rep. 319; *Hellman v. Fowler*, 24 Ark. 235; *Mitchell v. Watson*, 9 Fla. 160; *Matheney v. Earl*, 75 Ind. 531; *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. Rep. 236; *Thomas v. Hoffman*, 62 Iowa 125; *Relf v. Boro*, 17 La. Ann. 258; *Clough v. Buck*, 6 Neb. 343; *Pratt v. Cunliff*, 9 Allen (Mass.) 90; *Hinds v. Miller*, 52 Miss. 845; *Watkins v. Gray*, 5 Mo. App. 592; *Echols' Appeal*, 129 Pa. 554, 18 Atl. Rep. 559; *Mawson v. Goldstone*, 9 Phila. (Pa.) 30; *Greene v. Tripp*, 11 R. I. 424; *Railroad v. Todd*, 11 Heisk. (Tenn.) 549; *Holek v. Phoenix Ins. Co.*, 63 Tex. 66; *Washburn v. New York, etc., Co.*, 41 Vt. 50; *Orton v. Noonan*, 31 Wis. 90; *Frisk v. Reigelman*, 75 Wis. 499, 43 N. W. Rep. 1117.

Where no notice was ever served, personally, on the defendant in the attachment, no appearance ever entered for him, none of his property attached, no indebtedness or property fixed in the hands of the garnishee, no valid judgment can be entered against the principal defendant. *Hellman v. Fowler*, 24 Ark. 235; *Washburn v. New York, etc., Co.*, 41 Vt. 50.

Where the summons sued out against the principal defendant was not signed, judgment by default against him is void and the garnishment proceedings thereon are necessarily void. *Sheppard v. Powers*, 50 Ala. 377.

When a judgment upon which garnishment has been issued in aid of execution, is reversed, the garnishment will necessarily fail also. *Clough v. Buck*, 6 Neb. 343.

No valid judgment can be entered against an administrator who is a

stranger to the record, no service of process having been made upon him, nor property attached in his hands. *Echols' Appeal*, 119 Pa. 554, 18 Atl. Rep. 559.

If the attachment be void in which the garnishment process issued, no judgment can be entered against the garnishee, although a personal judgment has been entered against the defendant. *Greene v. Tripp*, 11 R. I. 424; *Railroad v. Todd*, 11 Heisk. (Tenn.) 549; *Mitchell v. Watson*, 9 Fla. 160.

Where there is an absence of jurisdiction of both the subject-matter and the person of the principal debtor, no valid judgment can be entered against the garnishee. If a judgment be entered against him in such a case his payment of it will be no protection to him in a suit thereafter brought. *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. Rep. 236. As to judgment in garnishment protecting the garnishee in subsequent suits, see *post*, § 707.

Where a garnishee has not been notified of the time and place in which to answer, he will not be rendered liable by a judgment against him. Such judgment is invalid and will be vacated on motion after the expiration of the term in which it was entered. *Thomas v. Hoffman*, 62 Iowa 125.

An amendment improperly made will render all proceedings void. *Orton v. Noonan*, 31 Wis. 90; *Frisk v. Reigelman*, 75 Wis. 499, 43 N. W. Rep. 1117.

If a judgment is improperly entered against a garnishee, he will be entitled to an injunction against an execution issuing thereon. *Watkins v. Gray*, 5 Mo. App. 592.

A general judgment can not be en-

ment is to subject money or effects in the hands of one (the garnishee) belonging to another (the defendant) against whom the plaintiff either has or expects to have a judgment; therefore no judgment can be rendered *against* a garnishee until one has been first obtained against his creditor. Final judgment against a defendant is an indispensable prerequisite to the entering of a final judgment against the garnishee.¹ The liability of the garnishee depending upon a judgment against the defendant, it follows that if no judgment be entered against him, the garnishment proceedings will fail, or if a void or voidable judgment be entered against the principal defendant and the same is thereafter set aside, or if the judgment against the principal defendant be reversed on appeal, the garnishment proceedings will necessarily fail and the garnishee will be entitled to be discharged.² Furthermore, if a valid judgment be entered against the principal debtor and the same is afterwards

tered against a garnishee for want of appearance. If such a one is entered it will be stricken out as informal. *Mawson v. Goldstone*, 9 Phila. (Pa.) 30. A judgment *nisi* should be entered in such case and the default made final according to the practice required by the local statute. See *post*, §§ 683-4.

Where a judgment is improperly entered against a garnishee, he may object in *scire facias* proceedings that the judgment against the principal defendant was invalid for want of service. *Pratt v. Cunliff*, 9 Allen (Mass.) 90.

1. *Lowry v. Clements*, 9 Ala. 422; *Leigh v. Smith*, 5 Ala. 583; *Gaines v. Beirne*, 3 Ala. 114; *Zurcher v. Magee*, 2 Ala. 253; *Arnold v. Gullatt*, 68 Ga. 810; *Bryan v. Dean*, 63 Ga. 317; *Emanuel v. Smith*, 38 Ga. 602; *Housmans v. Heilbron*, 23 Ga. 186; *Bean v. Barney*, 10 Iowa 498; *Toll v. Knight*, 15 Iowa 370; *Blackon v. Ballentine*, 16 N. J. L. (1 Harr.) 484; *Seawell v. Murphy*, *Cooke* (Tenn.) 478; *Edrington v. Allsbrooks*, 21 Tex. 186; *Kensha Stove Co. v. Shedd*, 82 Iowa 540,

48 N. W. Rep. 933; *Bridge v. Shedd*, 82 Iowa 540, 48 N. W. Rep. 933; *Burdett v. Shedd*, 82 Iowa 540, 48 N. W. Rep. 933; *Barton v. Smith*, 7 Iowa 85; *Merchant v. Howland*, 46 Ill. App. 458; *Collins v. Friend*, 21 La. Ann. 7; *Laidlaw v. Morrow*, 44 Mich. 547; *Erwin v. Heath*, 50 Miss. 796; *Kellogg v. Freeman*, 50 Miss. 127; *Roberts v. Barry*, 42 Miss. 260; *Metcalf v. Steele*, 42 Miss. 511; *Miller v. Anderson*, 19 Mo. App. 71; *Cheairs v. Slaten*, 3 Humph. (Tenn.) 101; *Sun Mutual Ins. Co. v. Seeligson*, 59 Tex. 3; *Haggerty v. Ward*, 25 Tex. 144; *Washburn v. N. Y. & V. M. Co.*, 41 Vt. 50.

When a judgment is rendered in favor of the defendant, the garnishee is thereby necessarily discharged. *Commercial Mfg. Co. v. Conrad*, 9 Phila. (Pa.) 24.

2. *Mitchell v. Watson*, 9 Fla. 160; *Strong v. Hollon*, 39 Mich. 411; *Rowlett v. Lane*, 43 Tex. 274; *Edrington v. Allsbrooks*, 21 Tex. 186; *Beaupre v. Brigham*, 79 Wis. 436, 48 N. W. Rep. 596.

paid and satisfied, the proceedings or judgment against the garnishee become *functus officio*. The purpose for which the proceedings were instituted having been accomplished, garnishment ceases to be a valid process for any purpose unless possibly it be for costs.¹

If, however, the garnishee admits an indebtedness to the principal defendant, the court has jurisdiction of the *res* of the defendant, and may, in effect, render judgment against the defendant to the extent of the value thereof and render judgment against the garnishee for the same, where no third person claims rights therein.² In these cases, by the rules of practice in some courts, a judgment in form is entered against the defendant for the amount by the plaintiff proven to be due and a judgment with execution against the garnishee, or ordering the garnishee to turn over the funds in his hands in any amount not exceeding the amount of the debt and costs.³ But the judgment in such cases can be none other than a judgment *in rem*, for no valid personal judgment can be rendered against a defendant upon whom there has been no personal service, or who has not voluntarily appeared.⁴

Therefore the garnishee is not charged on his answer, but is dismissed and the whole proceedings against a defendant who is not personally before the court will also fail.⁵

Furthermore, where the proceedings are commenced by garnishment there is no such independent suit against the principal defendant that when judgment is entered against him execution may forthwith issue thereon; neither can he be considered as being out of court after judgment is rendered. Such judgment must lie until the proceedings against the garnishee is determined.⁶

In like manner if a garnishee answers and judgment has not yet been entered against the defendant, the garnishee is not en-

1. Hammett v. Morris, 55 Ga. 644.

2. Burs v. Parish, 9 Ala. 211; Byers v. Baker, — Ala. —, 16 S. Rep. 72; Enochs v. Baker, — Ala. —, 16 So. Rep. 72; Alamo Ice Co. v. Yancey, 66 Tex. 187.

3. George v. Blue, 3 Call (Va.) 455.

4. Johnson v. Dodge, 19 Iowa 106.

5. Campbell v. Scott, 5 T. B. Mon. (Ky.) 387.

6. Jones v. Spear, 21 Vt. 426; Campbell v. Scott, 5 T. B. Mon. (Ky.) 387.

titled to be discharged, but he continues before the court for the purpose of receiving its judgment upon his answer which, as above stated, can not be entered until after judgment is entered against the defendant.¹

It is because of the fact that no valid judgment can be entered against the garnishee unless a valid judgment has been first entered against the defendant, that the garnishee is permitted to question the jurisdiction of the court and the validity of the judgment rendered against the defendant.²

Wherever garnishment is a proceeding in aid of an execution, that is to say, where a judgment must be rendered against the principal defendant and execution returned "no property found," before any garnishment can be had, the proceedings upon a writ issued before judgment and execution against the principal defendant will be wholly void, and if the garnishee pay a judgment entered against him in such a case, it will be no protection against a suit thereafter begun against him.³

Notwithstanding the fact that an original attachment is ancillary to the principal suit against the defendant, a judgment in such attachment will not be extinguished by a subsequent judgment against a garnishee summoned in such attachment.⁴

A judgment against a garnishee is distinct from the judgment against a principal defendant, and there must be a separate execution against each. A single execution issued against both will be irregular.⁵

§ 682. Same—Effect of death.⁶—The death of a principal

1. Bostwick v. Beach, 18 Ala. 80.

2. Sun Mutual Ins. Co. v. Seeliger, 59 Texas 3; *ante*, § 660.

Judgment by confession.—If judgment is rendered against the defendant by confession it is sufficient to render the garnishee liable for a fund in his hands at the time of service of process upon him. Littell v. Scranton, etc., Co., 42 Pa. St. 500; Daniel v. Daniels, 62 Miss. 352.

3. Whitcomb v. Atkins, 40 Neb. 549, 59 N. W. Rep. 86; Hamilton v. Allen, 4 Harr. (Del.) 326; *post*, § 707.

4. Price v. Higgins, 1 Litt. (Ky.) 274.

5. Rider v. Alexander, 1 D. Chip. (Vt.) 267.

6. As to the effect of death of a defendant in proceedings by direct attachment, see *ante*, Vol. I, § 332.

defendant after judgment has been rendered against him will not discharge a garnishee in a garnishment suit pending, provided execution has been taken out within the proper time.¹ Whether or not an attachment by garnishment is dissolved by the death of a principal defendant pending an attachment suit in which judgment has not been rendered against him depends largely upon the provisions of the controlling statute, and whether or not the cause of action on which the garnishment is founded be one that will, by such statute, survive the death of the principal defendant. If the cause of action be one that will survive at the common law or under the statute, and the statute does not expressly declare that such an attachment will abate at suit of the defendant, the death of such defendant pending the attachment will not abate it and therefore will not discharge the garnishee.² On the contrary, if the cause of action will not survive, or by statute the attachment abates, the garnishee will necessarily be discharged by the death of the principal defendant and the garnishee may be entitled to costs against the plaintiff.³

Where judgment by default has been obtained against a garnishee who has property of the principal defendant in his possession, the death of such absent principal defendant will not abate the proceedings.⁴ And the same has been held to be true in regard to a non-resident defendant, where the garnishee's answer admits an indebtedness to him, although such death occur before judgment *in rem* is entered against the non-resident defendant.⁵

1. Tyler v. Winslow, 46 Me. 348; Bethel v. Chipman, 57 Mich. 379; Bowman v. Stark, 6 N. H. 459; Swasey v. Antram, 24 Ohio St. 87; Miller v. Williams, 30 Vt. 386.

There should be a suggestion of death upon the record in the manner provided by law, but a failure to make such suggestion does not render the judgment void, but only voidable. Swasey v. Antram, 24 Ohio St. 87.

2. Thacher v. Bancroft, 15 Abb. (N. Y.) Pr. 243; Davis v. Shapleigh, 19

Ill. 386; Loubat v. Kipp, 9 Fla. 60; Melins v. Houston, 41 Miss. 59.

3. Wilmarth v. Richmond, 11 Cush. (Mass.) 463; Harrison v. Renfro, 13 Mo. 446; Vaughn v. Sturtevant, 7 R. I. 372; Crocker v. Radcliffe, 1 Treadw. (S. Car.) Const. 83; Bliss v. Peirce, 3 R. I. 126; Dwyer v. Benedict, 12 R. I. 459.

4. Kennedy v. Raguet, 1 Bay (S. Car.) 484.

5. Bryan v. Green, 3 Ired. Eq. (N. Car.) 167.

If the garnishee die before he has filed an answer, his death will cause the abatement of the garnishment, because the personal representative of the garnishee can not be compelled to answer.¹ But if after the garnishee has answered, he die pending a continuance before judgment is rendered, a judgment may be rendered against him as of the term at which he files his answer.²

The death of the attaching creditor will, in general, abate attachment proceedings against absconding, concealed and non-resident debtors.³

If a claimant of property in the hands of a garnishee dies pending the proceedings, it is the duty of the plaintiff and not of the garnishee to have the cause revived against the claimant's personal representatives; and if no such revival is had, no judgment can be rendered against him.⁴

§ 683. **Judgment by default—Judgment nisi.**—A judgment by default may be entered against a garnishee when he fails to appear, in the same manner as defaults may be entered in other cases.⁵ But the mere fact that the garnishee makes default in answering as he is by the writ commanded to do, will not generally entitle the plaintiff to a judgment of condemnation against him to the full amount of the defendant's indebtedness. There must be some proof by answer or examination to establish his liability.⁶ A conditional judgment

1. *Wootten v. Harris*, 5 Harr. (Del.) 254; *White v. Ledyard*, 48 Mich. 264; *Brecht v. Corby*, 7 Mo. App. 300; *Parker v. Parker*, 2 Hill (S. Car.) Ch'y 35; *Tate v. Morehead*, 65 N. Car. 681; *ante*, § 616.

2. *Hall v. Harvey*, 3 N. H. 61.

3. *Matter of Vargas*, 19 Wend. (N. Y.) 154; *Crocker v. Radcliffe*, 3 Brev. (S. Car.) 23.

4. *Linn v. Taylor*, 42 Ala. 303; *post*, § 682.

5. *Gracy v. Coates*, 2 McCord (S. Car.) 224.

It has been held that where a garnishee neglects to make a return to

the attachment until after judgment has been entered against the principal defendant, no further proceedings are necessary as against him and judgment may be entered upon motion and without notice to him. *Richardson v. Whitfield*, 1 McCord (S. Car.) 403.

6. *Giles v. Hick*, 45 Ark. 271; *Brotherton v. Anderson*, 6 Mo. 388; *Lewis v. Faul*, 29 Ark. 470; *St. Louis, I. M. & S. Ry. v. Richter*, 48 Ark. 349, 3 S. W. Rep. 56; *Wingfield v. McLure*, 48 Ark. 510, 3 S. W. Rep. 439; *Griswold v. Popham*, 1 Duv. (Ky.) 170; *ante*, §§ 617 and 638.

(judgment *nisi*) should be first entered against him for a specific amount and steps taken to make the same final in the manner prescribed by the controlling statute.¹ A judgment entered against a garnishee by default will be a *prima facie* liability against him, but it will be uncertain in amount until evidence is adduced to establish the amount of damages.² Before final judgment can be entered against the garnishee he must have the warning and the time to answer required by the practice of the court in which the suit was pending. It has been said that where a garnishee has had an opportunity to make his defense and has neglected to do so, his case having been set on the docket and several times called during the term by the judge, the judgment then entered by default could not be set aside on the grounds of irregularity or surprise, on a motion made therefor after the expiration of the term in which the judgment was entered, although it has been a number of years since he was brought into court by service of process.³ A final judgment rendered against a garnishee, who has not answered without judgment *nisi* having been previously taken, will be irregular and erroneous, but it will not be

1. Jones v. Tracy, 75 Pa. St. 417; Jones v. Hart, 2 Ala. 73; Whitehead v. Henderson, 4 Sm. & M. (Miss.) 704; Grauer v. Watson, (Pa. Com. Pl.) 3 Pa. Dist. R. 641; Gildersleeve v. Carraway, 19 Ala. 246.

Judgment *nisi* must be for a certain sum *in numero*. Since a final judgment can not be variant from a conditional remedy on which it was entered, it follows that a judgment *nisi* must be entered for a specific sum. Dickerson v. Walker, 1 Ala. 48; *post*, §§686-690. A judgment *nisi* reciting that it is for "the sum of \$63 debt and \$26.76 damages with interest thereon from the 2d day of October, 1848," was held to be sufficiently certain. Drane v. King, 21 Ala. 556.

2. Townsend v. Libbey, 70 Me. 162; Laughlin v. January, 59 Mo. 383.

3. Gibbons v. Cherry, 53 Md. 144; Abell v. Simon, 49 Md. 318.

In Pennsylvania by statute an execution issuing on a judgment more than five years old must be accompanied with a *scire facias* to renew such judgment or the proceedings will be dismissed. Sweeting v. Wanamaker, (Pa. Com. Pl.) 4 Pa. Dist. Rep. 246; Sweeting v. Wanamaker, 16 Pa. Co. Ct. R. 268; Sweeting v. Wanamaker, 36 W. N. C. 279.

In Washington by force of statute if the person neglects for two years to prosecute the proceedings against the garnishee, the garnishee will be entitled to be discharged. Wooding v. Puget Sound Nat. Bank, — Wash. —, 40 Pac. Rep. 223.

absolutely void. The garnishee may rely upon it and offer it in evidence in a subsequent action brought against him by a person to whom the defendant assigned the debt after the judgment was rendered, even though such action be brought in the name of the principal defendant himself.¹

Likewise the plaintiff may be entitled to have a default entered against the garnishee, although the garnishee has answered. If the garnishee has filed an incomplete or evasive answer or states mere conclusions of law, or has refused to answer further interrogatories, or to file a supplemental answer, or to appear and support the truth of his answer when contested, judgment by default should be entered against him, and the same made final in like manner as default judgments are in other cases.²

The fact that a garnishee is before the court by having filed a plea to the jurisdiction thereof, is not such a general appearance as will entitle the plaintiff to have a final judgment entered against him by default. In such a case a conditional judgment should be entered with *scire facias* returnable to the next term, or other proceedings agreeable to the rules of the court.³ Likewise where a garnishee has answered not disclosing an indebtedness, and it does not appear that the truth of

1. *Gildersleeve v. Carraway*, 19 Ala. 246.

Regarding judgment against non-resident defendant, in Indiana, where he has not appeared after publication made and proved and the number of continuances required before such judgment is entered, see *Henrie v. Sweasey*, 5 Blackf. (Ind.) 273.

2. *Lehman v. Hudmon*, 79 Ala. 532, 4 So. Rep. 741; *Henwood v. American Legion of Honor*, (Pa. Com. Pl.) 2 Pa. Dist. R. 170; *Scamahorn v. Scott*, 42 Iowa 529; *Penn v. Pelan*, 52 Iowa 535.

If, without sufficient excuse, the garnishee files an answer instead of

appearing for personal examination, as required by the order of the court, such answer may be stricken from the files and judgment entered against him as by default. *Penn v. Pelan*, 52 Iowa 535.

Motion to set aside default should, in Iowa, be made at the same term in which default is entered, and if after a default is entered against the garnishee he does not comply with the order of the court it will be error for the court to suspend execution and give the garnishee time to answer. *Scamahorn v. Scott*, 42 Iowa 529.

3. *Toledo, etc., R. R. Co. v. Reynolds*, 72 Ill. 487.

the answer was questioned, no final judgment can be entered and *scire facias* ordered,¹ or like proceeding had.

In no case can a judgment by default be rendered against a garnishee unless it appears on the face of the proceedings that the court has jurisdiction to enter a binding judgment against the garnishee.² And a *final* judgment can not be sustained against a corporation unless the record shows that the person upon whom the process of garnishment was served, and upon whom the notice of the judgment *nisi* was served, was the president of such corporation at the time of such service; unless there has been an appearance on behalf of the company.³ It is not sufficient to sustain a final judgment that the record should contain the words "judgment *nisi*" as against a defaulting garnishee at the close of the entry of a judgment against the defendant. Nor will a recital, in the record of final judgment, that such a judgment was rendered, be sufficient to sustain the final judgment, because such entries do not show, except by inference, in whose favor and against whom the judgment *nisi* was rendered; neither do they show that such a judgment was entered on the statutory condition that it should be made final unless the garnishee appeared within the time therein stated.⁴

Final judgment against the defendant being a necessary condition precedent to a final judgment against the garnishee, the appearance and answer of the garnishee at any time before such final judgment is entered against the defendant will prevent

1. *Frost v. Patrick*, 11 Miss. 3, (Smed. & M.) 783; *Threefoot v. White*, — Miss. —, 15 So. Rep. 120.

2. *Montgomery, etc., R. R. Co. v. Hartwell*, 43 Ala. 508; *Lawrence v. Lane*, 9 Ill. 354; *Dunn v. Missouri Pac. Ry. Co.*, 45 Mo. App. 29; *Johnson v. McCutchings*, 43 Texas 553; *Sun Mutual Ins. Co. v. Seeligson*, 59 Texas 3.

No default can be entered where the affidavit for the writ does not show that the garnishee resides within the jurisdiction of the court in which the

suit is brought, nor if the writ of garnishment does not designate the cause in which the garnishee is called upon to answer. *Johnson v. McCutchings*, 43 Texas 553.

The return must show a valid service upon the garnishee or no default can be entered. *Sun Mutual Ins. Co. v. Seeligson*, 59 Texas 3; *Dunn v. Missouri Pac. Ry. Co.*, 45 Mo. App. 29.

3. *Montgomery, etc., R. R. Co. v. Hartwell*, 43 Ala. 508.

4. *Bonner v. Martin*, 37 Ala. 83.

the entry of a final judgment by default against the garnishee.¹ Upon notice being received by the garnishee of motion to enter judgment against him, he can, by leave of court, file his answer *nunc pro tunc* and cure the default which has been entered.²

The appearance and plea of the principal defendant will entitle the garnishee to have a judgment previously entered against him set aside and will entitle him to take the money out of court.³

Default against a claimant who has been summoned to contest with the plaintiff his right to the money in the hands of a garnishee, having been made to appear on the record, the court will proceed with the garnishment as though no such claimant had been disclosed, in a state providing a means by which such disclosed claimant may be compelled to interplead at his peril.⁴

§ 684. **Judgment on scire facias.**—After conditional judgment (judgment *nisi*) has been entered against a garnishee upon his default as above stated, proceedings by *scire facias*, or some equivalent proceeding, must be resorted to to get the garnishee before the court to show cause why judgment should not be made final. The purpose of the *scire facias* or equivalent proceeding is to make it known to the garnishee that a conditional judgment has been rendered against him in which it has been assumed that he was the debtor of the principal defendant and he must show cause why he should not be adjudged liable to pay the same to the plaintiff in lieu of his creditor, the principal defendant. Whether the process be *scire facias* or an equivalent writ or notice, it must be shown on the face of the proceedings that the same was duly served

1. Arnold v. Gullatt, 68 Ga. 810.

2. Swann v. Lee, 15 Rich. L. (S. Car.) 164.

In Rhode Island by force of statute the default judgment entered against the garnishee is recoverable in an action on the case, at which time the garnishee may defend by showing that he took the necessary steps to

enter his defense in the garnishment proceedings and therefore should not have been charged. Eddy v. Providence Mach. Co., 15 R. I. 7, 22 Atl. Rep. 1116.

3. Stephenson v. Todd, 63 N. Car. 368.

4. Evans v. Norman, 14 Ala. 662.

upon the garnishee or the court will have no jurisdiction to enter judgment.¹ The right to have a judgment against a garnishee is a right conferred by statute, *stricti juris*. Therefore it must appear on the record that the statute has been complied with as to "calling him" or whatever the statute may prescribe before final judgment can be entered.² The record must show a definite judgment or it will be erroneous. The record showing the same judgment to be for three different amounts will warrant the dismissal of the garnishment proceedings.³

The judgment entered against the garnishee on default only makes out a *prima facie* case as above shown.⁴ It may be disputed on *scire facias*.⁵ The garnishee having a right, as

1. Goode v. Holcombe, 37 Ala. 94; Decatur, C. & N. O. Ry. Co. v. Crass, 97 Ala. 519, 12 So. Rep. 43; Dew v. Bank of Alabama, 9 Ala. 323; Horat v. Jackel, 59 Ill. 139; Cariker v. Anderson, 27 Ill. 358; Langford v. Ottumwa W. P. Co., 53 Iowa 415; Fifield v. Wood, 9 Iowa 249; Cheney v. Whiteley, 9 Cush. (Mass.) 289; Brackon v. Ballentine, 16 N. J. L. (1 Harr.) 484; Henwood v. American Legion of Honor, (Pa. Com. Pl.) 2 Pa. Dist. Rep. 170; Wetherill v. Flanagan, 2 Miles (Pa.) 243. Compare Hibernia, etc., Society v. Superior Court, 56 Cal. 265.

The purpose of the proceeding being to notify the garnishee that final judgment is about to be entered against him, his voluntary appearance will be sufficient, although service upon him be open to objection or the writ or its service be irregular. Decatur, C. & N. O. Ry. Co. v. Crass, 97 Ala. 519, 12 So. Rep. 43.

By a practice under which in a suit pending in one county, the writ of garnishment was sued out and sent to another county and by the sheriff of

such county returned executed, and a conditional judgment thereafter entered against the garnishee for failing to appear, no final judgment can be entered against such garnishee until a writ of *scire facias* issued on the conditional judgment is sent to the county in which the garnishee was served or resides and returned by the sheriff of that county duly served. Morris v. Russell, 20 Ala. 357. The garnishee must have notice in the manner required by law.

2. Culbertson v. Ellison, 20 Tex. 101.

3. Bickford v. Fannery, 70 Me. 106.

The garnishee himself may procure the court at its discretion to direct the plaintiff to issue *scire facias* against him, the garnishee. Finch v. Bullock, 10 Phila. (Pa.) 318.

Proceedings by *scire facias* against a garnishee may be maintained in the name of an assignee of the original judgment in Maine by force of statute. Ware v. Bucksport & Bangor R. R. Co., 69 Me. 97.

4. *Supra*, § 683.

5. Townsend v. Libley, 70 Me. 162.

hereinbefore stated,¹ to make a defense on the *scire facias* proceeding; either to make an answer, a further answer, or to correct errors in his former disclosure, and the plaintiff has a like right to interrogate him further in regard to his liability.² The question to what amount he is chargeable is to be determined on the *scire facias* proceedings when it is left uncertain by the disclosure theretofore made.³

When a garnishee is duly notified to appear on a *scire facias* or notice to show cause why execution should not issue upon a judgment rendered against him by default, he must do so or he will be deemed to have had his day in court, and a final and binding judgment will be entered, and execution will be issued against him thereon.⁴ But he will be charged on *scire facias* only for the amount of the judgment against the principal defendant with legal interest and costs.⁵ And if the original judgments against the defendant have been partly satisfied, only the sum remaining due can be recovered against the garnishee on the *scire facias* or like proceeding.⁶

§ 685. Judgment charging garnishee—(a) On answer showing liability.—An answer of a garnishee which, by confession, makes out a *prima facie* case for the plaintiff, will entitle the latter to a judgment against such garnishee. When a plaintiff asks a court for a judgment upon the garnishee's answer, such request on motion is in the nature of a demurrer to evidence, and if the facts stated in such answer do not clearly establish the garnishee's liability, no judgment against him can be obtained. The answer is then the exclusive foundation of the judgment to be entered. Such answer must contain a

1. *Ante*, § 648.

2. *Taylor v. Day*, 7 Me. (7 Greenl.) 129; *McMillan v. Hobson*, 46 Me. 91; *Ross v. McKinny*, 2 Rawle (Pa.) 227; *Bacon Academy v. De Wolf*, 26 Conn. 602.

3. *Winchester v. Titcomb*, 17 Pick. (Mass.) 435.

But facts relating to the original debtor's discharge in bankruptcy

under statutes were not deemed to be admissible as a defense to a *scire facias* proceeding. *Franklin Bank v. Bachel-der*, 23 Me. 60.

4. *Byard v. Stewart*, 1 Root (Conn.) 149; *Langford v. Ottumwa Water Power Co.*, 53 Iowa 415.

5. *Tyler v. Winslow*, 46 Me. 348.

6. *Sawyer v. Lawrence*, 40 Me. 256.

sufficient statement of facts to support a judgment. If his answer admits a liability or sets forth facts in detail, because of which he may or may not be liable, a judgment on his answer without a trial is proper, because the question of his liability is then a question of law.¹ Judgment will be rendered upon the statement of facts as if they were true, and though it may not admit a distinct liability, yet if it state facts from which a liability to a certain amount can be adjudged by the court, and show a cause of action on which the defendant could have maintained an action of debt or *indebitatus assumpsit*, the plaintiff will be entitled to a judgment against the garnishee on his answer.² If, by weighing and balancing probabilities, the court can determine the amount of the indebtedness, judgment may be rendered against the garnishee;³ but if the amount is unliquidated, uncertain, contingent, or affected by existing liens, no judgment can be entered.⁴

1. Hackley v. Kanitz, 39 Mich. 398; Moore v. Moore, 12 Phila. (Pa.) 173; Kelley v. Tibbals, 53 Pa. St. 408; Mul-ten v. Maguire, 10 Phila. 435; Fithian v. Brooks, 1 Phila. (Pa.) 260; Greenleaf v. Perrin, 8 N. H. 273; Davis v. Pawlette, 3 Wis. 300; Grever v. Cul-ver, 84 Wis. 295, 54 N. W. Rep. 585.

2. Self v. Kirkland, 24 Ala. 275; Mann v. Buford, 3 Ala. 312; Hurst v. Home, P. F. Ins. Co., 81 Ala. 174; Smith v. Clarke, 9 Iowa 241; Walker v. Detroit, etc., Ry. Co., 49 Mich. 446; Church v. Simpson, 25 Iowa 408; *ante*, § 482, "Must be a demand that will support an action of debt or *indebitatus assumpsit*"; *ante*, §§ 622-630, "What the answer must state."

3. Peterson v. Poignard, 8 B. Mon. (Ky.) 309.

4. *Ante*, §§ 475, 483, "Nature of the demand that must exist between debtor and garnishee."

When notice unnecessary.—Where a garnishee has admitted his indebtedness, no notice to him of a motion for judgment on his answer is necessary, although it be at a subsequent term

the attachment not having been discharged and there being no issue to be determined. Leigh v. Smith, 5 Ala. 583; Letondal v. Huguenin, 26 Ala. 552. But if there is an uncertainty as to the title, the possession, prior liens, or other matter which may affect the liability of the garnishee to the principal defendant, no judgment can be entered against him until he or others are notified and such issues determined. Covington v. Kelly, 6 Ala. 860.

Premature entry of judgment by confession cured by verdict.—If a garnishee appears at the return of a summons issued against him and confesses an indebtedness on which judgment is entered before judgment is rendered against the principal defendant, such judgment against the garnishee, although premature and irregularly entered, may be treated as only a clerical error, after judgment has been rendered against the defendant. Carper v. Richards, 13 Ohio St. 219.

No final judgment where prior suit pending on same demand between de-

§ 686. (b) **When a fund—The amount.**—The position of the garnishee being the same that it would be were he a defendant debtor in an action brought by his creditor, the true test of his liability is the extent to which he would be liable were he the defendant in such a case. The inquiry of the court is, what could the debtor recover of the garnishee? If this can be definitely determined, then judgment may be entered for that amount, unless such amount is more than enough to satisfy the judgment the plaintiff has obtained against the principal defendant with costs. If the amount due to the principal defendant is more than enough to satisfy the plaintiff's demand, then judgment will be entered against the garnishee only for an amount sufficient to satisfy that demand with costs. In any event the judgment against the garnishee can not be greater than that against the defendant; nor can it be greater than the defendant could recover against the garnishee. If no answer has been filed, the judgment must be rendered for the amount that is sworn to in the affidavit for the garnishment, but if it is rendered for a greater amount, it will not be void except as to the excess.¹

Again, where the garnishment has been sued out on a judgment, the recovery against the garnishee can not be greater than the amount of the judgment on which the proceedings were brought, no matter what the indebtedness of the defendant to the plaintiff may be. It is only the judgment debt that can be recovered in this case.² And the judgment entered on recovery must recite the amount of the prior judgment, but a

defendant and garnishee.—If a suit begun by the principal debtor against the garnishee before service of the garnishment proceedings be undetermined, final judgment can not be entered against a garnishee. *Burnham v. Folsom*, 5 N. H. 566. The usual practice is to continue the garnishment proceeding until the prior suit is determined. As to "Effect of other suits pending," see *ante*.

1. *Hall v. Baldwin*, 31 Ala. 509;

Maduel v. Mousseaux, 29 La. Ann. 228; *Timmons v. Johnson*, 15 Iowa 23; *Scott v. Hill*, 3 Mo. 88; *Holmes v. Herndon*, 31 Miss. 296; *Jennings v. Summers*, 7 How. (Miss.) 453; *Skinner v. Moore*, 2 Dev. & B. (N. Car.) 138; *Chase v. Manhardt*, 1 Bland. (Md.) 333; *Mullen v. Maguire*, 10 Phila. (Pa.) 435; *Moursund v. Priess*, 84 Tex. 554, 19 S. W. Rep. 775.

2. *Hitchcock v. Watson*, 18 Ill. 289.

failure so to do will be considered a clerical error, which may be corrected on motion.¹ And, furthermore, the writ issuing against the garnishee being an original process, no amount can be recovered against the garnishee thereon greater than stated in such process, even though the amount of the judgment on which it was sued out be greater than the amount stated in the writ.²

It is the duty of the court simply to render judgment against the garnishee for the amount found to be due from him to the judgment debtor.³ The judgment should set forth *in numero* the amount of the judgment of condemnation and the amount of the costs so as to afford the garnishee authoritative evidence of the amount he is entitled to claim against the judgment debtor.⁴ And a judgment condemning a specific sum found in the possession of the garnishee must specify the amount of the plaintiff's judgment against the defendant.⁵ If the indebtedness of the garnishee to the defendant is payable in a specific manner described by contract, the garnishee can not be held liable to the plaintiff in any other manner. The plaintiff's garnishment proceeding can not alter the contract relations of the garnishee and his creditor.⁶

When a garnishee's indebtedness to the principal defendant is established and the specific amount is not determined, judgment can not be entered against the garnishee.⁷ However, it has been held that where the garnishee admitted an indebtedness to the principal defendant for services rendered in a certain official capacity that, although his salary as such had not been determined, yet judgment might be rendered against the garnishee to the amount of the salary admitted to be paid to such officer's immediate predecessor for the performance of the like services.⁸

1. Gatchell v. Foster, 94 Ala. 622, 10 So. Rep. 434.

2. Hoffman v. Simon, 52 Miss. 302.

3. Brummagim v. Boucher, 6 Cal. 16.

The entry of a further order that the garnishee pay the money to the sheriff is improper in California. Brummagim v. Boucher, 6 Cal. 16.

4. Randolph v. Little, 62 Ala. 396.

5. Faulks v. Heard, 31 Ala. 516.

6. National Union Bank v. Brainerd, 65 Vt. 291, 26 Atl. Rep. 723; Bartlett v. Wood, 32 Vt. 372.

7. Roth v. Hotard, 32 La. Ann. 280.

8. South and North Ala. R. R. Co. v. Falkner, 49 Ala. 115.

Where the garnishee admits an indebtedness to a foreign creditor in a certain amount in foreign money, judgment must be rendered against him only for the amount due at the par value of the lawful money.¹

§ 687. (c) When property—The surrender.—The answer of a garnishee admitting that he has in his possession property belonging to the principal defendant will not entitle the plaintiff to a judgment against such garnishee for a specific sum of money. The only judgment the court can render against the garnishee in such a case is that he turn over to the sheriff the effects in his possession. The court can not go beyond this and make a further order upon the sheriff to dispose of the property and apply the proceeds. Such end will, however, be accomplished by the writ of execution which will issue upon the judgment entered against the principal defendant. When the garnishee so surrenders the effects to the sheriff in compliance with the judgment of the court, he will be discharged from further liability.²

It must be observed, however, that where the plaintiff has sought to enforce an alleged claim that the garnishee holds or controls property, etc., belonging to the principal defendant, an admission by the garnishee that he is indebted to the defendant will not warrant a recovery against the garnishee.³

1. *Adams v. Cordis*, 8 Pick. (Mass.) 260.

Payment before judgment against defendant.—Where a state statute provides that the garnishee may relieve himself from further liability by paying into court the fund which he admits he owes to the principal defendant, a garnishee who so pays the money into court is exonerated from further liability, although the fund may have been misapplied by an officer of the court, and although judgment may thereafter be rendered in favor of the principal defendant

against the plaintiff. *Troyer v. Schweizer*, 15 Minn. 241; *Kramer v. J. Q. Adams & Co.*, — Iowa —, 63 N. W. Rep. 180; *Humphrey v. O'Donnell*, 165 Pa. St. 411, 30 Atl. Rep. 992; *Melton v. Kansas City, F. S. & M. R. Co.*, 39 Mo. App. 194.

2. *Jennings v. Summers*, 7 How. (Miss.) 453; *Coombs v. Davis*, 2 Wash. Ter. 466; *Maybin v. Williamson*, 4 Harr. (Del.) 434; *Marston v. Carr*, 16 Ala. 325.

3. *Botsford v. Simmons*, 32 Mich. 352.

§ 688. (d) **When upon note in circulation.**—The liability of the garnishee who is indebted upon a promissory note is controlled by such diverse statutes in the different states that no particular rule can be laid down in regard to the entry of a judgment thereon. What has been hereinbefore stated regarding a garnishee's liability in such cases must be observed in rendering judgment against him.¹ It is, however, a universal effort of all courts to protect the disinterested and unwilling garnishee who has been summarily brought into court. No judgment will be entered against him for his indebtedness upon an outstanding promissory note, unless he is indemnified in some manner, or such note is surrendered to him;² or some prescribed notice given to bring in the parties interested or to bind them in their absence.³

§ 689. (e) **When interest to be included.**—The position of the garnishee in court being a compulsory one without compensation, he will be protected from any further liability than would have existed against him had he not been proceeded against. Therefore, he will not be charged interest upon the fund which he has been compelled to retain in his possession. It will be suspended unless he has mingled the money with his own, or has in some way made use of it to his own advantage, or has held it in bad faith, or has made unreasonable delay, or has resisted payment, or has otherwise acted in violation of his duty.⁴

The garnishee is not, however, necessarily excused from his

1. *Ante*, §§ 562-574.

2. *Seals v. Wright*, 37 Iowa 171; *Shuler v. Bryson*, 65 N. Car. 201; *Marshall v. Grand Gulf R. Co.*, 5 La. Ann. 360.

3. *Horn v. Thompson*, 31 N. H. (11 Fost.) 562.

The admission by a garnishee that he holds as security to himself the note of a third party executed to the defendant will not entitle the plaintiff to a judgment against him. *Dryden v. Adams*, 29 Iowa 195. The liability

must not be affected by any existing liens. *Ante*, § 481.

The admission of a garnishee of indebtedness to the defendant upon a promissory note which has not yet matured will not entitle the plaintiff to a judgment against him. *Kitsler v. Thompson*, (Pa. Com. Pl.) 3 Lack. Jur. 341. The liability must be one upon which the defendant could maintain a suit at law against the garnishee. *Ante*, § 475.

4. *Kirkman v. Vanlier*, 7 Ala. 217;

existing liability to pay interest upon his indebtedness to the defendant, and it being a principle as well established that he can make no personal profit by the proceeding as that he shall not be injured thereby, he will be held to the interest which by his contract he was to have paid to the principal defendant.¹ But, since he must stand ready to pay over the fund in his hands, if the same earn no interest the court will not hold him chargeable therewith.²

§ 690. (f) **When indebtedness not yet payable.**—No final judgment can be rendered against a garnishee until his indebtedness to the principal defendant has become due and payable.³ For until then the defendant could not have recovered a judgment against the garnishee.⁴ Nevertheless, many state statutes permit the garnishment of an indebtedness which is not yet due, and among such states there are two general methods of practice in such cases. One method is to continue the proceedings against the garnishee and thereby keep the matter pending in court until the indebtedness has matured and until final judgment can be entered therein against the garnishee.⁵ The other method is to enter judgment against the garnishee with stay of execution, until such time as his liability to the

Woodruff *v.* Bacon, 35 Conn. 97; Candee *v.* Skinner, 40 Conn. 464; Little *v.* Owen, 32 Ga. 20; Georgia Ins. and Trust Co. *v.* Oliver, 1 Ga. 38; Moore *v.* Lowrey, 25 Iowa 336; Bickford *v.* Rice, 105 Mass. 340; Work *v.* Glaskins, 33 Miss. 539; Jones *v.* Man. Nat. Bank, 99 Pa. St. 317; Rushton *v.* Rowe, 64 Pa. St. 63; Allegheny Savings Bank *v.* Meyer, 59 Pa. St. 361; Irwin *v.* Pittsburgh, etc., R. R. Co., 43 Pa. St. 488; Mackey *v.* Hodgson, 9 Pa. St. 468; Willings *v.* Consequa, Pet. Cir. Ct. 301; Sickman *v.* Lapsley, 13 Serg. & R. (Pa.) 224; Fitzgerald *v.* Caldwell, 2 Dall. 215, 1 Yeates 274; Updegraff *v.* Spring, 11 Serg. & R. (Pa.) 188.

1. Blodgett *v.* Gardiner, 45 Me. 542;

Abbott *v.* Stinchfield, 71 Me. 213; Smith *v.* German Bank, 60 Miss. 69; Candee *v.* Webster, 9 Ohio St. 452; Mahon *v.* Kunkle, 50 Pa. St. 216; Baker *v.* Central Vermont R. R. Co., 56 Vt. 302. Compare Smith *v.* Flanders, 129 Mass. 322.

2. Candee *v.* Skinner, 40 Conn. 464; Hawkins *v.* Georgia Nat. Bank, 61 Ga. 106.

3. Wilson *v.* Albright, 2 Greene (Iowa) 125; *ante*, § 480.

4. *Ante*, §§ 471, 475 and 487.

5. Allen *v.* Claunch, 7 Ala. 788; Dunnegan *v.* Byers, 17 Ark. 492; Hobson *v.* Kelly, 87 Mich. 187, 49 N. W. Rep. 533.

The Alabama practice has now been changed by statute. See below.

defendant will have matured.¹ A middle ground has, however, been taken by a court entering an interlocutory order in the form of an injunction, protecting the possible rights of the plaintiff and retaining control of the cause for such further action as may be warranted by the later developments and pleadings.² But in any event an execution should not be issued before the maturity of the debt, and judgment directing that execution shall issue upon the non-payment at maturity will be improper, because there may be a failure of consideration before that time.³

If, however, the judgment is stayed by operation of law in such cases until the maturity of the garnishee's indebtedness, no order for the stay of judgment need accompany it.⁴

§ 691. (g) Regarding the form of the judgment.—Whatever judgment is rendered against the garnishee, it must be sufficient to afford him available evidence in any suit thereafter brought against him on the same demand. In some states it has been deemed necessary that the entry of judgment recite that such judgment shall operate, when paid, as a satisfaction of so much of the debt due from the garnishee to the defendant.⁵ But in general it will be sufficient if it be separate from the judgment in the principal action,⁶ and show that the court had jurisdiction, by a recital of the necessary prior proceedings,⁷ and that judgment has been rendered in favor of the plaintiff against the principal defendant.⁸ The legal effect of such judgment being to satisfy to the extent thereof the indebtedness between the garnishee and the principal defendant,

1. *Gatchell v. Foster*, 94 Ala. 622, 10 So. Rep. 434; *Cottrell v. Varnum*, 5 Ala. 229; *Pursell v. Pappenheimer*, 11 Ind. 327; *Anderson v. Wanzer*, 6 Miss. (5 How.) 587.

2. *Roberts v. Drinkard*, 3 Metc. (Ky.) 309.

3. *Pursell v. Pappenheimer*, 11 Ind. 327.

4. *Anderson v. Wanzer*, 6 Miss. (5 How.) 587.

5. *Atcheson v. Smith*, 3 B. Mon. (Ky.) 502; *Speak v. Kinsey*, 17 Tex. 301; *Hamilton v. Rogers*, 67 Mich. 135.

6. *Ante*, § 678.

7. *Ante*, §§ 679, 680.

8. *Ante*, § 681.

the judgment against the garnishee need not in general specifically express such satisfaction.¹

If a judgment *nisi* has been entered, such judgment to be valid must have been rendered in a specific sum *in numero*,² and consequently a final judgment thereafter entered can not be variant from the prior conditional judgment.³ In a judgment upon a garnishee's answer confessing a liability, it has been said the garnishee should, in order to protect himself, have his confession entered at large on the record. Then if the court decide erroneously an appeal or writ of error would be efficacious in correcting it.⁴

A judgment upon a garnishment proceeding, sued out upon a prior judgment in favor of the plaintiff will, in most states, be entered in the name of the plaintiff against the garnishee, although the action may be begun by an assignee of such judgment, and if the same is not done it may be corrected in the appellate court at the cost of the appellant.⁵ But, in Illinois, where the proceeding in garnishment is not only considered to be in *effect* a suit by the principal defendant against the garnishee, as it is generally considered,⁶ but is considered to be *in fact* a suit by the defendant against the garnishee; whatever judgment is rendered against the garnishee must be rendered in the name of the defendant and not of the plaintiff. It should, however, be rendered in favor of the defendant for the use of the attachment plaintiff, rather than to be in form a judgment in favor of both the defendant and plaintiff.⁷ The

1. Stadler v. Parmlee, 14 Iowa 175.

2. *Ante*, § 683.

3. Dickerson v. Walker, 1 Ala. 48; Drane v. King, 21 Ala. 556.

In Pennsylvania it has been held that a verdict must find not only that the goods and effects were in the hands of the garnishee at the time of the attachment or afterwards, but that the value thereof must also be expressed and that a judgment on a verdict not containing such specification will be set aside. Hampton v. Matthews, 14 Pa. St. 105.

Where administrators are garnishees, judgment must not be entered against them *de bonis propriis*. Lorenz v. King, 38 Pa. St. 93.

4. Stockton v. Hall, Hardin (Ky.) 160.

5. Jackson v. Shipman, 28 Ala. 488.

6. *Ante*, § 465.

7. National Bank v. Indiana Banking Co., 114 Ill. 483; Towner v. George, 53 Ill. 168; Rankin v. Simonds, 27 Ill. 352; Cariker v. Anderson, 27 Ill. 358; Gillilan v. Nixon, 26 Ill. 50; Farrell v. Pearson, 26 Ill. 463; Boddie v. Tudor

judgment therefore should be rendered in that state for the whole amount of the debt due to the defendant and not merely for a sufficient amount to pay the plaintiff. Whatever surplus then remains after the satisfaction of the plaintiff's demand will belong to the attachment or judgment debtor in whose name the judgment is entered.¹

The judgment entry must recite the amount of the indebtedness and the amount of the judgment against the principal defendant,² but an omission so to do will be considered a clerical error and will be corrected on motion.³

A judgment can not be entered against the garnishee and the attachment defendant jointly;⁴ nor can it be entered in favor of both the plaintiff and defendant against the garnishee.⁵

Judgments against garnishees must be interpreted by the pleadings and the nature of the obligations sued upon. A judgment against garnishees that they are jointly and severally agents of the debtor has been held to be good.⁶ And where two persons were sued as garnishees, one failing to answer and the other acknowledging a *partnership* debt due from both, a judgment for the whole debt against the one who answers is proper.⁷ But where several garnishees have been sued as ordinary persons, a judgment can not be rendered against them

Boiler Mfg. Co., 51 Ill. App. 302; Ham v. Peery, 39 Ill. App. 341; Chicago, Rock Island, etc., Ry. Co. v. Mason, 11 Ill. App. 525; Gibbon v. Bryan, 3 Ill. App. 298.

1. Webster v. Steele, 75 Ill. 544; Kern v. Chicago Co-operative Brewing Asso., 140 Ill. 371, 29 N. E. Rep. 1035, 40 Ill. App. 356, affirmed; Rankin v. Simonds, 27 Ill. 352; Cariker v. Anderson, 27 Ill. 358; Hitchcock v. Watson, 18 Ill. 289.

There is no difference in this regard between garnishment proceedings on a judgment and garnishment in attachment. Webster v. Steele, 75 Ill. 544; Kern v. Chicago Co-operative

Brewing Asso., 140 Ill. 371, 29 N. E. Rep. 1035, 40 Ill. App. 356, affirmed.

2. Ante, § 686.

3. Gatchell v. Foster, 94 Ala. 622, 10 So. Rep. 434.

4. Fourth Nat. Bank v. Mayer, 89 Ga. 108, 14 S. E. Rep. 891; Masters v. Turner, 10 Phila. (Pa.) 482.

5. Ham v. Peery, 39 Ill. App. 341.

6. Todd v. Potter, 1 Day (Conn.) 238.

7. Speak v. Kinsey, 17 Tex. 301.

This was on the general liability of the partner for the indebtedness of the firm.

in solido. Solidarity is never presumed.¹ Several garnishees may, however, be included in one *execution* when the controlling statute is silent on the subject.²

§ 692. (h) **Regarding personal judgment.**—An attachment proceeding is a proceeding *in rem* when the defendant is not personally in court.³ And in such a case a special judgment will be entered perfecting the lien upon property seized, and condemning the same to the satisfaction of the plaintiff's demand.⁴ Garnishment is a species of attachment and therefore where the defendant is not, or has not been, personally before the court, a general judgment can not be entered against him. Only so much of the property or effects can be condemned as will satisfy the demand of the plaintiff with costs. For that reason a special judgment should be entered against the property or effects of the defendant in the hands of the garnishee, directing the same to be applied to the satisfaction of the plaintiff's demand.⁵ No personal judgment should be entered against the garnishee in such a case, because he may have admitted an indebtedness to the defendant in an amount greater than that sufficient to satisfy the demand of the plaintiff against the defendant. In Illinois, however, the action against the garnishee is deemed to be in fact a suit by and in the name of the principal defendant against his debtor, the garnishee, and the judgment is there entered in favor of the defendant against the garnishee for the amount of the garnishee's indebtedness to him for the use of the plaintiff. If then the judgment in favor of the defendant is for a sum more than sufficient to satisfy the demand of the plaintiff with

1. McKinbrough v. Castle, 19 La. Ann. 128.

2. Cornelius v. Simpson, 3 Phila. (Pa.) 35.

3. *Ante*, Vol. I, § 5.

4. *Ante*, Vol. I, § 451.

5. Byrn v. Blackman, 94 Tenn. 569, 29 S. W. Rep. 961; Smith v. McCutchen, 38 Mo. 415; DeWitt v. Kelly, 18 Ore. 557, 23 Pac. Rep. 666;

Carter v. Koshland, 13 Ore. 615, 11 Pac. Rep. 292; Bonnaffon v. Thompson, 83 Pa. St. 460; Clark v. Foxworthy, 14 Neb. 241; Marble Falls Ferry Co. v. Spitler, (Tex. Civ. App.) 25 S. W. Rep. 985; Passumpsic Bank v. Beattie, 32 Vt. 315; Campbell v. Simpkins, 10 Wash. 160, 38 Pac. Rep. 1039.

costs, the surplus belongs to the principal defendant in the garnishment proceeding, he has thereby become a judgment creditor of the garnishee.¹ In West Virginia, also, a personal judgment may be entered against the garnishee, where his indebtedness to the defendant has been established, and where it appears that the plaintiff has recovered a judgment against the defendant, and that the judgment being entered against the garnishee is greater than that which has been entered against the defendant.² In Wisconsin a personal judgment may be entered against the garnishee in favor of the plaintiff for the amount of the plaintiff's judgment against the defendant where property in excess of that amount has been fraudulently conveyed to the garnishee by the defendant.³ In Oregon also a personal judgment may be rendered against the garnishee, although it is not so specially provided by the statute.⁴

§ 693. (i) **Regarding liability to the defendant and another.**—In rendering judgment against a garnishee, it is fundamental that no binding judgment can be rendered against him until a judgment is first rendered against the person to whom he is indebted.⁵ It is also fundamental that no judgment can be rendered against him when his indebtedness to such defendant is, by the answer, or evidence in support of the issue, left uncertain.⁶ Therefore, where it is determined that the liability of the garnishee is to the defendant and a stranger to the suit jointly, no judgment can be rendered therefor against the garnishee and in favor of the plaintiff.⁷ If, however, the garnishee disclose a joint and several liability, or a separate liability to the defendant and another *pro rata*, judgment may be rendered against him for the amount shown to be due solely to the defendant.⁸

1. Webster v. Steele, 75 Ill. 554.

2. Joseph v. Pyle, 2 W. Va. 449.

3. Sutton v. Hasey, 58 Wis. 556.

4. Carter v. Koshland, 13 Ore. 615.

5. Ante, § 681.

6. Ante, § 481.

7. Saller, etc., Co. v. Insurance Co. of

North America, 62 Ala. 221; Mobley v. Lonbat, 8 Miss. (7 How.) 318; Meyer v. Deffarge, 30 La. Ann. 548; Andrews v. Union Bank of Tennessee, 21 Ala. 576.

8. Meyer v. Deffarge, 30 La. Ann., Part I, 548.

Furthermore, if the garnishee disclose a liability to the defendant and a stranger to the suit, such stranger may, in many states, be compelled to interplead, or his claim disregarded because of his default in so doing.¹ And if, at the trial of such interplea, it be determined that a part of the fund belongs to the defendant and a part to the interpleader, judgment may be rendered against the garnishee for the part found due to the principal defendant.²

§ 694. **Judgment discharging garnishee.**—There are several conditions that may exist or arise under which the garnishee will be entitled to be discharged with costs against the plaintiff. If after the plaintiff has brought the garnishee into court by process he does nothing further to maintain his attachment, but neglects and abandons it, the garnishee is entitled to be discharged with costs.³ He is also entitled to costs where there appears to have been an abuse of process.⁴ He is also *prima facie* entitled to a judgment discharging him with costs against the plaintiff where the answer denies all liability to the principal defendant.⁵ He may remain before the court until judgment is entered against the principal defendant, but he is entitled to have a judgment entered discharging him at that time.⁶ Where also the evidence leaves it doubtful whether the garnishee is or is not liable to the principal defendant,⁷ or that

1. *Andrews v. Union Bank of Tennessee*, 21 Ala. 576; *Saller, etc., Co. v. Insurance Co. of North America*, 62 Ala. 221; *ante*, §§ 671-677.

2. *Kirby v. Corning*, 54 Wis. 599.

As to the other part, judgment should have been rendered for the interpleader with costs against the plaintiff on the trial of the interpleader. *Kirby v. Corning*, 54 Wis. 599; *ante*, § 677.

3. *Peck v. Stratton*, 118 Mass. 406; *Webber v. Bolte*, 51 Mich. 113; *Noble v. Bourke*, 44 Mich. 193; *Johnson v. Dexter*, 38 Mich. 695; *Selz v. First Nat. Bank*, 55 Wis. 225; *Dunham v.*

Murphy, (Tex. Civ. App.) 28 S. W. Rep. 132; *Wooding v. Puget Sound Nat. Bank*, (Wash.) 40 Pac. Rep. 223.

4. *Noble v. Bourke*, 44 Mich. 193.

5. *Curry v. Nat. Bank of Augusta*, 53 Ga. 28; *Bates v. Forsyth*, 64 Ga. 232; *Jones v. Howell*, 16 Ala. 695; *ante*, § 641.

6. *Emery v. Royal*, 117 Ind. 299, 20 N. E. Rep. 150; *Cheatham v. Trotter, Peck*, (Tenn.) 198; *ante*, § 681.

7. *Pioneer, etc., Co. v. Sanborn*, 3 Minn. 413; *Banning v. Sibley*, 3 Minn. 389; *Thompson v. Shelby*, 3 Smedes & M. (Miss.) 296; *ante*, §§ 622, 623, 627 and 643.

a lien exists thereon,¹ or that the garnishee is charged with special instructions for the application of the fund or property,² judgment must be entered in favor of the garnishee. Likewise if a judgment has been rendered in favor of the defendant, the garnishee is thereby necessarily discharged,³ unless the plaintiff appeal from the judgment of the court. The garnishee remains before the court until a final determination of the cause.⁴ The garnishee will not be protected in delivering the money or property to his creditor before there is an order of court entered discharging him.⁵ If the statute fixes a certain time in which the plaintiff must appeal from an order discharging the garnishee, the omission to appeal within such time will of itself operate to discharge the garnishee.⁶ Furthermore, if the proceedings have been so irregular that the court has not acquired jurisdiction over the principal defendant and also of the garnishee, it has no power to enter judgment against the garnishee and he must necessarily be dismissed.⁷

§ 695. **Judgment in garnishment not a lien.**—Garnishment is a species of attachment, but it differs from attachment by direct seizure in many particulars, and in no instance is the difference so noticeable as in the effect of the judgment that may be entered therein. For upon the force and effect of the judgment entered depends the whole practicability of the proceeding. A judgment properly entered in attachment after a direct seizure perfects a lien upon the specific property seized under the writ.⁸ But a judgment entered in favor of a plaintiff in a garnishment proceeding is no lien upon any specific fund or property.⁹ It only holds the garnishee to a personal lia-

1. *Ante*, §§ 481 and 627. *First Nat. Bank v. Beaver*, (Pa. Com. Pl.) 3 Lack. Jur. 403.

2. *Ante*, § 644.

3. *Commercial Mfg. Co. v. Conrad*, 9 Phil. (Pa.) 24; *ante*, § 681.

4. *Ante*, § 639.

5. *Hughes v. Monty*, 24 Iowa 499; *Cleneay v. Junction R. R. Co.*, 26 Ind. 375.

6. *Peterson v. Hays*, 85 Iowa 14, 51 N. W. Rep. 1143.

7. *Bender v. Bridge*, 18 Ark. 593; *Goulding v. Hair*, 133 Mass. 78; *Harris v. Doherty*, 119 Mass. 142; *Southern Bank v. McDonald*, 46 Mo. 31; *ante*, § 646.

8. *Ante*, Vol. I, §§ 10 and 452.

9. *McGarry v. Lewis Coal Co.*, 93 Mo. 237, 6 S. W. Rep. 81; *Johnson v.*

bility to the plaintiff in whose favor the judgment is entered.¹ The garnishment, while pending, is in so much a lien as to restrain the garnishee from disposing of it to the prejudice of the plaintiff and likewise to prevent the defendant from interfering therewith.² When, however, no judgment is rendered against the garnishee other than that he turn over to the officer, to be sold, the property admitted to be in his possession belonging to the principal defendant, the effect of such order is equivalent to the perfected lien of a judgment by direct seizure.³

When judgment is a lien.—There are, however, exceptional circumstances which may cause a plaintiff to acquire a lien beyond the ordinary effect of his judgment; that is where the defendant has a statutory lien upon the property of the garnishee. For then, because the judgment in garnishment subrogates the plaintiff to the rights of the defendant against the garnishee, the plaintiff thereby acquires the lien held by the defendant against the garnishee. For example, where the garnishee is a tenant of the judgment debtor who has a landlord's lien upon the crops of his tenant, a judgment against the garnishee for the rent will give the plaintiff a lien upon the crops of the tenant, and the judgment need not state the amount or the value of the crops.⁴

§ 696. Judgment gives plaintiff the rights defendant had.—The effect of the judgment rendered against the garnishee in favor of the plaintiff is not only to subrogate the plaintiff to the rights the defendant had against his own debtor, the garnishee, but, when an indebtedness exists, it makes such plaintiff a judgment creditor thereon, because the garnishment

Gorham, 6 Cal. 195; Dennistoun v. N. Y. C. & S. Co., 6 La. Ann. 782; Gregg v. Savage, 51 Ill. App. 281; Parker v. Farr, 2 Browne (Pa.) 331; McConnell v. Denham, 72 Iowa 494; Mooar v. Walker, 46 Iowa 164.

1. Gregg v. Savage, 51 Ill. App. 281; Mooar v. Walker, 46 Iowa 164.

2. Martin v. Foreman, 18 Ark. 299; McConnell v. Denham, 72 Iowa 494; Embree v. Hanna, 5 Johns. (N. Y.) 101; Parker v. Farr, 2 Browne (Pa.) 331.

3. McBride v. Floyd, 2 Bailey L. (S. Car.) 209; *ante*, § 687; also, *ante*, § 451.

4. Kelly v. Gibbs, 84 Tex. 143, 19 S. W. Rep. 380, and 563.

proceeding has been in effect a suit by the defendant against his debtor, the garnishee.¹ But the remedy is no more summary than it would have been had it been begun by the principal defendant himself.² Where property is in possession of the garnishee belonging to the defendant, and to the possession of which he is entitled, a judgment directing the garnishee to surrender such property³ is in effect an assignment of the rights of the defendant therein to the plaintiff in whose favor the judgment is rendered. A judgment in favor of the garnishee, who is indebted to the defendant on notes secured by mortgage, is in effect an assignment to the plaintiff of the notes and mortgage, and he may bring suit to foreclose such mortgage.⁴

Furthermore, if in truth the garnishee is indebted to the defendant and yet is discharged, such fact does not estop the creditor from levying an execution upon the property bought with the money afterwards paid by the garnishee to the defendant.⁵

Judgment on answer does not estop the plaintiff from another action.—The fact that the plaintiff has acquired a judgment against a garnishee upon the latter's admitted indebtedness to the principal defendant does not prevent the plaintiff from suing another person for the sum due, although the plaintiff acquired the cause of action by taking an assignment from the defendant; nor does it prevent him from showing that such person and not the garnishee is in fact the debtor on such demand.⁶

§ 697. Judgment on bond given to dissolve garnishment.—The giving of a bond to dissolve a process of garnishment is controlled by the principles governing bonds given to dissolve or pay the judgment in attachment.⁷ And like in such cases

1. Fuller v. Foote, 56 Conn. 341, 15 Atl. Rep. 760; Kellogg v. Freeman, 50 Miss. 127; Waldron v. Wilcox, 13 R. I. 518; ante, § 465; Huntington v. Risdon, 43 Iowa 517; Hollingsworth v. Fitzgerald, 16 Neb. 492.

2. Rice v. Whitney, 12 Ohio St. 358.

3. Ante, § 687.

4. Alsdorf v. Reed, 45 Ohio 653, 17 N. E. Rep. 73.

5. Milligan v. Bowman, 46 Iowa 55.

6. Lewis v. Robertson, 100 Ala. 246, 14 So. Rep. 166.

7. Ante, § 615.

many state statutes also provide that where the issue between the defendant and the plaintiff has been determined, judgment may be forthwith entered upon the bond against the principal and sureties thereon without the further necessity of bringing an action at common law upon such bond; but the rule above laid down¹ still obtains and no judgment can be entered upon such bond until judgment shall first be obtained against the principal defendant.² But no judgment can be entered upon a bond given to dissolve a garnishment until judgment has been entered disposing of such garnishment. A judgment entered upon the bond would have no foundation were it not for the judgment dissolving such bond.³

§ 698. **Costs for or against the garnishee.**—Inasmuch as a garnishee occupies an unsought and often an unwilling position in the suit, and since he stands aloof from any activity in the proceedings, occupying the position of a stakeholder indifferent to both parties,⁴ the policy of the courts is to hold him harmless, and will not tax costs against him where he is not at fault, not even where he has suffered default, if he has made no active opposition.⁵ Garnishment is an equitable proceeding and costs will be awarded as against the plaintiff and garnishee as to equity and good conscience shall seem meet.⁶

Costs are largely a matter of special statute, but, nevertheless, they have not generally been permitted against a garnishee who has answered truly.⁷ But if he has made unnecessary litigation, costs may be taxed against him.⁸ As where he

1. *Ante*, § 681.

2. *Whitehead v. Patterson*, 88 Ga. 748, 16 S. E. Rep. 66; *Rich v. Sowles*, 65 Vt. 135, 26 Atl. Rep. 585.

Sureties estopped. — Sureties who have voluntarily executed the bond and have thereby procured the dissolution of attachment, can not thereafter object to the jurisdiction of the court in regard to such garnishment; nor will they be permitted to show that the garnishee was in fact liable

to pay the debt to the plaintiff. *Rich v. Sowles*, — Vt. —, 26 Atl. Rep. 585.

3. *Whitehead v. Patterson*, 88 Ga. 748, 16 S. E. Rep. 66.

4. *Ante*, §§ 471, 474.

5. *Johnson v. Delbridge*, 35 Mich. 436.

6. *White v. Kilgore*, 78 Me. 323.

7. *Little Wolf River Improvement Co. v. Jackson*, 66 Wis. 42.

8. *Lucas v. Campbell*, 88 Ill. 111; *Strong v. Hollon*, 39 Mich. 411.

has sought to avoid a fair investigation of his liability.¹ And where upon investigation more is found to be due from him to the principal defendant than he has admitted in his answer.² Courts are inclined only to award costs against a garnishee when he has funds within his hands with which to pay the same.³ And they will never require him to pay the costs out of his own means, unless he resorts to unnecessary, protracted litigation.⁴

Costs will be awarded to the garnishee for attorney's fees in preparing his answer where he is discharged upon his answer,⁵ or where his answer is controverted and on the trial of the issue it is found that he is not liable to any greater extent than he had first admitted in his answer.⁶ And where he has incurred the expense of counsel fees for the purpose of upholding the true answer, the same may be included in the costs taxed against the plaintiff.⁷ If he has been compelled to submit to an oral examination, costs of traveling, attendance and other necessary expenses have been awarded to him.⁸ He has also been allowed attorney's fees where the plaintiff has discontinued the proceeding,⁹ although the plaintiff had notified

1. *Randolph v. Heaslip*, 11 Iowa 37.

2. *Conant v. Burns*, — N. H. —, 19 Atl. Rep. 11; *Walker v. Wallace*, 2 Dall. (U. S.) 113.

If, however, such greater amount has been caused by lapse of time after the answer was made, no costs will be taxed against the garnishee. *Conant v. Burns*, (N. H.) 19 Atl. Rep. 11.

3. *Williams v. Housel*, 2 Iowa 154; *Gracy v. Coates*, 2 McCord (S. Car.) 224.

4. *Hannibal & St. Joseph R. R. Co. v. Crane*, 102 Ill. 249.

5. *Willis v. Heath*, 75 Tex. 124, 12 S. W. Rep. 971; *Llano Improvement & Furnace Co. v. Castanola*, (Tex. Civ. App.) 23 S. W. Rep. 1016.

6. *Conant v. Burns*, — N. H. —, 19 Atl. Rep. 11; *Walker v. Wallace*, 2 Dall. (U. S.) 113; *Vandusen v. Schrader*, 14 Phila. (Pa.) 132.

7. *Darnall v. Wood*, 82 Ga. 556, 9 S. E. Rep. 282; *Holbrook v. Waters*, 19 Pick. (Mass.) 354. *Contra*, *Bernheim v. Borgan*, 66 Miss. 184, 6 So. Rep. 649.

8. *National Union Bank v. Brainerd*, 65 Vt. 291, 26 Atl. Rep. 723; *Porter v. Russell*, 1 Tyler (Vt.) 35; *Jennings v. Summers*, 7 How. (Miss.) 453; *Senior v. Brogan*, 66 Miss. 178, 6 So. Rep. 649; *Clark v. Gresham*, 67 Miss. 203, 7 So. Rep. 223; *Stewart v. Anderson*, 19 Mo. 478.

One statute further allowed reasonable compensation in exceptional cases. *Senior v. Brogan*, 66 Miss. 178, 6 So. Rep. 649; *Clark v. Gresham*, 67 Miss. 203, 7 So. Rep. 223.

9. *Griffiths v. Stockmuller*, 14 Phila. (Pa.) 236; *Wengert v. Bowers*, 8 Pa. Co. Ct. Rep. 292.

him of that fact.¹ Where he has answered asking that he be allowed to deduct his costs out of the fund admitted to be in his possession, and no traverse has been had, such costs should be ordered to be paid to him out of the fund awarded to the plaintiff.²

Costs will not, however, be allowed to a garnishee where his answer admits an indebtedness to the defendant and judgment is rendered against him therefor³ when the plaintiff takes no issue thereon.⁴ He is not entitled to any allowance for his trouble,⁵ nor is he allowed for his attorney's fees in preparing the answer, where by such answer he pleaded in reconvention. He thereby became a party litigant to the suit, and was not entitled to costs as he would have been had he sustained merely the indifferent position of a garnishee in ordinary cases.⁶ Nor is he entitled to costs on an appeal improperly taken.⁷ Nor is he allowed costs of travel to attend the trial of an appeal taken by either party on the main action. He is not interested in that issue.⁸ Neither is a garnishee, although he has admitted an indebtedness to the defendant, liable to costs upon the issue tried on an interplea, although it be decided against the interpleader. He is not a party to that issue.⁹

The allowance of costs to a garnishee should be granted at the term at which final judgment is rendered. An order allowing them can not be thereafter entered.¹⁰ If an order allowing costs to him be entered at a subsequent term to that in which a judgment discharging him was rendered, it will be void.¹¹ Neither can a motion for costs be allowed to a garnishee for fees and expenses after the cause has been submitted to an appeal.¹² If the garnishee desire to be awarded costs he must not sleep upon his rights.

1. *Continental Mills v. Dow*, 59 Me. 426.

2. *Baker v. Lancashire Ins. Co.*, 52 Wis. 193.

3. *Llano Improvement and Furnace Co. v. Castanola*, (Tex. Civ. App.) 23 S. W. Rep. 1016.

4. *Selz v. First Nat. Bank*, 55 Wis. 225.

5. *Mackey v. Hodgson*, 9 Pa. St. 468.

6. *Moursund v. Priess*, 84 Tex. 554, 19 S. W. Rep. 775.

7. *Kellogg v. Waite*, 99 Mass. 501; *O'Donnell v. McIntire*, 99 Mass. 551.

8. *O'Donnell v. McIntire*, 99 Mass. 551.

9. *Chambers v. Yarnell*, 37 Ala. 400.

10. *Ladd v. Couzins*, 52 Mo. 454; *Hawkins v. Graham*, 128 Mass. 20.

11. *Jackson v. St. Louis and San Francisco Ry. Co.*, 89 Mo. 104.

12. *Keating v. American Refrigerator Co.*, 32 Mo. App. 293.

CHAPTER XXXIII.

REVIEW OF GARNISHMENT.

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| § 699. Motion for new trial—Re-opening case. | § 704. Pending an appeal, the garnishee remains before the court. |
| 700. Appeal by the plaintiff. | |
| 701. Appeal by the defendant— <i>Certiorari</i> . | 705. Objections in the appellate court. |
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§ 699. **Motion for new trial—Re-opening case.**—Garnishment being a species of attachment, all that is hereinbefore contained,¹ relating to the “Review of Attachment Proceedings,” is applicable to the review of garnishment proceedings, so far as garnishment is identical with attachment; but inasmuch as they differ in many essentials, particularly the introduction of a third party, the garnishee, the following sections are designed to be supplemental to such preceding chapter.

It is universally conceded to be a matter within the sound discretion of the court to vacate a judgment during the term at which it was rendered, and thereby to re-open the cause and permit the garnishee (or other party) to have a trial or new trial of the matters at issue. Where a garnishee duly served with process filed an answer denying his indebtedness on a failure to appear at the term to which the process was returnable, the court ordered the garnishee to make an oral answer at a specified day, which he neglected to do, and on failure thereof the court entered a conditional judgment against him, and issued a *scire facias* directing him to appear at the next term to show cause why judgment should not be made absolute, and the garnishee neglected thereafter to appear as directed,

1. *Ante*, Vol. I, Chapter XXII, §§ 457–464.

and judgment absolute was rendered against him in his absence; it was held to be within the sound discretion of the trial judge during the term at which final judgment was rendered to permit the garnishee to make oral answer as he had been before instructed to do.¹ After the expiration of the term, however, a judgment against a garnishee rendered on a hearing was discreetly set aside where the motion therefor was founded on the alleged insufficiency of the evidence.²

A garnishee's failure to answer, through a mistake as to his legal duty, has been deemed to be proper ground on which he may have a judgment set aside that has been rendered for a much greater amount than he had in hand, provided he moves the court therefor during the term at which such judgment was entered.³ But, on the contrary, it has been held that a garnishee's mere ignorance of the necessity of his appearing in the attachment and contesting his liability, because of which he neglected so to do, a judgment was rendered against him without objection on his part, is not sufficient ground on which the court may vacate such judgment, and its action therein will be reversed; because it is said that, to warrant such relief, clear proof must be made that the garnishee neglected to make his defense in time because some deceit was practiced upon him by the garnishment-plaintiff.⁴ A court will properly refuse to set aside a judgment against a garnishee who fails to make answer after a copy of a writ and a notice so to do has been properly served upon him.⁵ A judgment rendered against the garnishee upon evidence of his indebtedness, after he has had reasonable time to ascertain the facts, will not be set aside without proof of due diligence on his part.⁶

1. *Talladega Mercantile Co. v. McDonald*, 97 Ala. 508, 12 So. Rep. 34.

If one member of a partnership, because of ill health, is prevented from making answer before judgment, it is within the discretion of the court to re-open the cause and permit him to make answer thereafter. *Talladega*

Mercantile Co. v. McDonald, 97 Ala. 508, 12 So. Rep. 34.

2. *Fort v. Strohecker*, 58 Ga. 262.

3. *Russell v. Freedman's Savings Bank of Mason*, 50 Ga. 575.

4. *Freidenrich v. Moore*, 24 Md. 295.

5. *Durant v. Staggers*, 2 Nott & M. (S. Car.) 488.

6. *Dunnegan v. Byers*, 17 Ark. 492.

A judgment against a garnishee should not be set aside, where it was permitted to be entered without contest, because of the ignorance or negligence of his attorney. An order by the circuit court setting aside such judgment was itself set aside by the supreme court.¹

The garnishee having voluntarily gone to trial without objection that a non-resident plaintiff had not given security for costs, can not sustain a motion based thereon for a new trial at a subsequent term.²

A judgment in garnishment rendered upon a false disclosure is properly set aside on motion. Furthermore, any payment made by the garnishee on such judgment will not protect him against his creditor. Nor will the plaintiff be entitled to hold such money except to the use of the defendant, who is entitled to have it refunded to him on demand.³

A garnishment in attachment issued without the affidavit and bond necessary to give the court jurisdiction, is certainly void, and will be set aside, as a matter of course, when the fact is brought to the attention of the court. The judgment against the principal defendant entered in such a case will likewise be void, and will be set aside on motion.⁴ On a motion for a new trial only, the grounds therefor should be presented to the court, and not the merits of such grounds or the proof necessary to sustain the issues omitted and because of which the new trial is asked. For example, if a court is asked to set aside a verdict on the ground that it did not show that the garnishee had possession, the question of possession is not a matter to be considered on the presentation of a motion for a new trial.⁵

The principal defendant in an original garnishment proceed-

1. *Foster v. Jones*, 1 McCord (S. Car.) 116.

2. *Weeks v. Napier*, 33 Ala. 568.

3. *First National Bank v. Mellen*, 45 Mich. 413. As to judgment in garnishment being a protection to the garnishee in a subsequent action by his creditor, see *post*, § 707.

4. *Ford v. Woodward*, 2 Smedes & M. (Miss.) 260; *Melloy v. Burtis*, 124 Pa. St. 161, 23 W. N. C. 289, 16 Atl. Rep. 747.

5. *Kiggins v. Woodke*, 78 Iowa 34, 42 N. W. Rep. 576.

ing may move the court for a new trial in garnishment, but it is within the sound discretion of the court, after the garnishee's answer has been passed upon, to set aside an entry charging him and to re-open the case for examination on motion of the principal defendant.¹ A judgment debtor, however, can not move the court for a new trial of the issues determined in a garnishment proceeding based upon a judgment theretofore entered against him where he has not been made a party to such proceeding if the garnishee has acquiesced in the verdict.² A defendant who has had judgment rendered against him is not a party to the record of the garnishment proceeding thereafter sued out upon such judgment and has no right to be heard.

§ 700. **Appeal by the plaintiff.**—An appeal lies from the judgment entered in garnishment cases the same as in other civil cases.³ A plaintiff may appeal from a judgment rendered regarding the liability of the garnishee, notwithstanding the fact that judgment by default may have been entered in his favor against the principal defendant.⁴ And it seems that where garnishment suits by two different plaintiffs against the same defendant have been tried together, and a judgment entered therein giving each a part of the fund, an appeal by one plaintiff who claims the whole will bring up both cases.⁵

All the parties to the judgment below must be made parties to the appeal. If the plaintiff appeals because proceedings

1. *Dill v. Wilbur*, 79 Me. 561, 12 Atl. Rep. 545.

2. *Foster v. Haynes*, 88 Ga. 240, 14 S. E. Rep. 570.

3. *Clark v. Williams*, 2 Humph. (Tenn.) 303.

An order simply discharging the garnishee, after examination, is, in *Minnesota v.* a final order and an appeal may be taken therefrom. *McConnell v. Rakness*, 41 Minn. 3, 42 N. W. Rep. 539.

Although an objection to the proceedings on the ground that they do

not show upon their face affirmatively that the requirements of the statute have been substantially complied with, may be made on motion to quash; yet the same objection may be urged on an appeal to the judgment after verdict. Such objection is not waived by going to a trial. *Coward v. Dillinger*, 56 Md. 59.

4. *Van Buskirk v. Martin*, 28 Vt. 726.

5. *Anderson v. De Soer*, 6 Gratt. (Va.) 363.

have been dismissed as against the principal defendant, the garnishee must be made a party, because he is interested in the result. If the proceedings against the defendant are sustained on appeal, the garnishee may thereafter be held liable.¹ But where an appeal is taken from a judgment in the garnishment proceeding sued out in aid of an execution, the judgment debtor is not a necessary party, because the issue is wholly between the judgment creditor and the garnishee.²

Appeals from justices' courts generally permit the case to be tried *de novo* in the circuit court, and therefore further interrogatories may be propounded to the garnishee.³ But where an appeal was taken from the judgment on the garnishee's answer and not upon the whole case, the issue between a claimant and the plaintiff tried on intervention will not be heard.⁴ Likewise where an appeal was taken from an order vacating the suit, which order was based solely upon the papers on file in the plaintiff's action against the principal debtor, the certificate of a commissioner regarding facts appearing before him in the garnishment suit can not be considered.⁵

On an appeal from a justice's judgment rendered in a garnishment proceeding which was sued out upon an unsatisfactory judgment, such unsatisfied judgment against the debtor in the original proceedings and the execution returned "not found" issued thereon must be produced in the circuit court to enable it to render judgment against the garnishee. Proof of such judgment can not be supported by the garnishee summons duly served, which recites an unsatisfied execution against the judgment debtor; nor upon the judgment entered by the justice against the garnishee, even though it appears that the justice had jurisdiction of such garnishee by his having appeared and answered.⁶

1. *Katz v. Sorsby*, 34 La. Ann. 588.

2. *Katz v. Sorsby*, 34 La. Ann. 588.

The garnishee may show in defense that he has made payment on the judgment against him, and such payment will furnish him a defense *pro tanto*. Furthermore there is no necessity that he should give notice of such

defense. *Minard v. Lawler*, 26 Ill. 301.

3. *Oliver v. Chicago, etc., R. R. Co.*, 17 Ill. 587.

4. *Scott v. Hawkins*, 99 Mass. 550.

5. *Barber v. Walker*, 26 Wis. 44.

6. *Miller v. Wilson*, 86 Tenn. 495, 7 S. W. Rep. 638.

§ 701. **Appeal by the defendant—Certiorari.**—The original debtor has a perfect right to appeal from a judgment rendered against a garnishee,¹ but if he is a non-resident he can not be heard to complain after a judgment has been rendered against him ordering the funds in the hands of the garnishee to be condemned to the satisfaction of the plaintiff's demand against such non-resident defendant, he having not appeared as a party to the suit below.² When the defendant sues out an appeal he must make the garnishee also a party because he is interested in the judgment and it can neither be affirmed nor reversed, without giving him an opportunity of being heard.³ An appeal from a principal judgment brings up the question of the garnishee's liability even though he may have been discharged in the court below.⁴

A judgment against the principal defendant being reversed on appeal, the judgment against the garnishee should also be reversed; and if there has been a judgment rendered against an assignee (a claimant) of the defendant, that judgment should likewise be reversed.⁵

Certiorari is a proper writ for the principal defendant to sue out where his rights have been cut off without his having had an opportunity to being heard.⁶ But where a judgment debtor has had the required notice of the proceeding and has not made opposition thereto, he can not under *certiorari* in the supreme court be heard to insist that the money garnished was due for wages and therefore exempt. Not having urged the same when he had an opportunity so to do, in the lower court, he will be estopped from doing so in the supreme court.⁷

A defendant can not have *certiorari* where the garnishee has already appealed from the judgment.⁸

1. *Kalisky v. Currey*, 9 Baxter (Tenn.) 214.

2. *Parks v. Adams*, 113 N. Car. 473, 18 S. E. Rep. 665.

3. *Katz v. Sorsby*, 34 La. Ann. 588.

4. *Kennedy v. Tiernay*, 14 R. I. 528.

5. *Smith v. Kansas City, St. J. & C. B. R. Co.*, 49 Mo. App. 54.

6. *Wilson v. Bartholomew*, 45 Mich. 41.

7. *State v. Bermudez*, 39 La. 622, 2 So. Rep. 425.

8. *Lichtenberg v. Hosmer*, (Mich.) 63 N. W. Rep. 963.

§ 702. **Appeal by the garnishee.**—If there is a possibility that the garnishee may have been unjustifiably held liable he may appeal from the final decision of the court below. He may appeal from a judgment rendered against him.¹ And his right to appeal does not depend upon the removal by appeal of the judgment in the principal action² But he can not call in question the regularity of the judgment entered against the defendant for whom he is garnished.³ He has no concern in the matters of the controversy between those parties any further than to see, before judgment goes against himself, that the judgment against the principal defendant is not absolutely void.⁴

If the garnishee contemplate the possibility of seeking relief by the review of a judgment that may be entered against him on his oral answer, he should have the same set out at large in the judgment record and then he can (if there be error in the judgment against him) either appeal or sue out a writ of error.⁵ Where also a judgment has been rendered without setting out his answer *in extenso*, but reciting that he has filed an answer, which is the basis of the judgment, such recital will be sufficient to authorize the court of review to look to the answer found in the transcript as a part of the record.⁶ Where the garnishee's answer has not been reduced to writing and signed

1. Forepaugh *v.* Appold, 17 B. Mon. (Ky.) 625; Richards *v.* Allen, 8 Pick. (Mass.) 405; Ball *v.* Gilbert, 12 Metc. (Mass.) 397.

2. Albachten *v.* Chicago, St. P. & K. C. Ry. Co., 40 Minn. 378, 42 N. W. Rep. 86; Richter *v.* Trask, 40 Minn. 379, 42 N. W. Rep. 87.

3. Security Loan Association *v.* Weems, 69 Ala. 584; *ante*, §§ 646-660.

4. Exchange Bank *v.* Freeman, 89 Ga. 771, 15 S. E. Rep. 693; *ante*, § 660.

Although the irregularity may be sufficient grounds for a reversal, so long as the principal defendant takes no steps to have it set aside, it is a suf-

ficient foundation for a proceeding in garnishment, and will neither be treated as a nullity nor vacated at the instance of the garnishee. Mead *v.* Doe, 18 Wis. 31.

Injunction.—If the garnishee has answered on the promise of the attorney of the plaintiff that he would be protected against outstanding notes, and was not, he may enjoin the garnishment plaintiff from collecting the judgment. Hayes *v.* O'Connell, 9 Ala. 488.

5. Stockton *v.* Hall, Hardin (Ky.) 160.

6. Price *v.* Thomason, 11 Ala. 875.

by him he is at liberty in the circuit court to dispute the facts recited in the justice's judgment against him.¹

If there is no possibility of the garnishee having been damaged by the entry of judgment against him, or if by his negligence he has created a legal estoppel, he can not thereafter appeal. The answer of the garnishee admitting an indebtedness to the principal defendant greater than the amount of the judgment rendered against such garnishee in a garnishment proceeding sued out upon a judgment, his appeal from the judgment against him will be dismissed.² Although he may have answered prematurely, if he has thereafter submitted without objection, to the trial of the issue raised thereon, he can not on appeal urge an objection to the regularity of the proceedings on the ground that his answer was prematurely filed.³ A garnishee can not appeal from a judgment setting aside an interplea where he did not in his answer disclose the fact that the fund or property sought to be charged was claimed by another.⁴ Furthermore, where the garnishee is not interested in the result of an interplea he can not appeal from the judgment of the court thereon.⁵

The garnishee can not appeal from a mere interlocutory order of the court directing him to turn over the funds to the sheriff to be held subject to the decision of the court in the proceeding. It is not an adjudication of the rights of the parties, nor a final determination of the liability of the garnishee. The garnishee is a mere stakeholder and has no interest in the disposition to be made of the funds garnished.⁶ An order *discharging* a garnishee is an order effecting a substantial right

1. Taylor v. Kain, 8 Baxter (Tenn.) 35.

2. Moreland v. Every Evening Pub. Co., 6 Houst. (Del.) 343.

3. Burlington and Missouri River R. R. Co. v. Chicago Lumber Co., 18 Neb. 303.

4. Alamo Ice Co. v. Yancey, 66 Tex. 187, 18 S. W. Rep. 499.

5. Germania Sav. Bank v. Peuser, 40 La. Ann. 796.

6. Rachereau v. Guidry, 24 La. Ann. 294; Collins v. Jennings, 42 Iowa 447; Mull v. Jones, 33 Kan. 112; Board of Education v. Scoville, 13 Kan. 17; ante, § 471-474.

Mandamus.—The suing out of a writ of mandamus is the proper proceeding to pursue, in case an improper interlocutory order is entered in a garnishment proceeding. People v. Cass Circuit Judge, 39 Mich. 407.

and may be reviewed on error or appeal before final judgment in the main action.¹

When an appeal is taken from a judgment against the garnishee the burden of proof rests upon the person seeking to establish the liability of such garnishee.²

One judgment having been rendered against the defendant in the court below, it is error for the court above, on an appeal by the garnishee from the judgment entered against him in the garnishment proceeding, to enter a second judgment against the principal defendant.³

§ 703. *Appeal by the claimant.*—An issue having been tried between an interpleader in a garnishment proceeding and the plaintiff, the claimant may appeal from a final judgment entered against him on such interplea properly interposed; but where he is a mere stranger to the record he can not be heard on appeal or otherwise, and when he appeals properly he will only be heard in regard to the issue in which he is prematurely interested.⁴ When, however, the court finds on an appeal taken by the interpleader that judgment was improperly rendered in the court below against the interpleader and also against the garnishee, the court will not only render judgment

1. Turpin v. Coates, 12 Neb. 321.

2. Reagan v. Pacific R. R., 21 Mo. 30.

3. Kennedy v. Aldridge, 5 B. Mon. (Ky.) 141.

Garnishee may enjoin the collection of judgment when.—To entitle a garnishee to enjoin the collection of a judgment rendered against him he must show that he has a good defense thereto and that the collection of it will be unjust, and also that he has been unable to avail himself of his defense within the proper time therefor or that he has been prevented by fraud or accident to which by his negligence he has not contributed. Freeman v. Miller, 53 Tex. 372.

Garnishee must seek his relief in the same cause.—Whenever judgment has been entered against a garnishee he must seek whatever relief he desires in the same cause by appeal or otherwise. He can not in a subsequent action brought against the principal defendant, after having permitted judgment in garnishment by default to be entered against him, recover the amount paid to the plaintiff on the ground that he did not in fact owe anything to such principal defendant. Segog v. Engle, 43 Minn. 191, 45 N. W. Rep. 427.

4. Gates v. Tusten, 89 Mo. 13, 14 S. W. Rep. 827.

in favor of the interpleader on his appeal, but will also enter a judgment discharging the garnishee.¹

§ 704. Pending an appeal the garnishee remains before the court.—No final judgment can be entered against the garnishee until final judgment is rendered against the principal defendant.² Where an appeal is taken in the proceedings, the cause is still pending and the garnishee is continued before the court, and must await the final determination of the cause therein. He will not be protected in a payment made after an attachment was determined where an appeal is taken therefrom without delay.³ If, however, the plaintiff after taking an appeal and thereby causing the garnishee to be continued before the court, take out an execution against the principal defendant, he will thereby waive his appeal and the garnishee will be discharged.⁴

§ 705. Objections in the appellate court.—A party, either the plaintiff, defendant, garnishee, or claimant, having submitted without objection to the trial of the issue or issues in which he is interested, can not object to the form of the proceeding for the first time in the court of review.⁵ A party having had the opportunity to object to whatever might have seemed to have been irregular and not having interposed an objection, it will be presumed that any ground which existed therefor was waived.⁶ If a garnishee has not objected in the court below to the irregularity of the process he can not be heard on a writ of error to allege that he was not served according to the forms prescribed by law.⁷ After the garnishee has appeared and contested his indebtedness without objecting to the sufficiency of the return of the process he can not be heard to urge such objection in the appellate court.⁸ Neither can a claimant (an as-

1. *Barker v. Garland*, 22 N. H. (2 Fost.) 103.

2. *Ante*, § 681.

3. *Puff v. Huchter*, 78 Ky. 146; *Bryan v. Duncan*, 19 D. C. 379; *Erickson v. Duluth, S. S. & A. Ry. Co.*, — Mich. —, 63 N. W. Rep. 420.

4. *Jarvis v. Mitchell*, 99 Mass. 530.

5. *Towne v. Leach*, 32 Vt. 747.

6. *McAllister v. Brooks*, 22 Me. 80.

7. *Smith v. Chapman*, 6 Porter (Ala.) 365.

8. *Joseph v. Pyle*, 2 W. Va. 449.

signee from the defendant) who has asked and been refused leave to assert his claim in the court below, contest the plaintiff's right in the appellate court, unless he has entered exceptions in the trial court and brought the question up on a bill of exceptions.¹ And where the tribunal (or commissioner) who has tried the issue had jurisdiction to determine the fact, the appellate court will not review the decision rendered thereon, unless exceptions thereto were properly entered and have been brought up on a bill of exceptions.²

§ 706. *Collateral attack on judgment.*—A garnishee is deemed to have sufficient opportunity by the various methods of obtaining a review of the judgment entered in the court below to seek relief from minor irregularities in the proceedings which render the judgment voidable only. Therefore he will be limited to such forms of procedure to have an investigation of his rights and will not be permitted to attack the judgment collaterally.³

This rule does not, however, prevent a garnishee from thereafter setting up the facts necessary to show that the amount owing by him to the debtor is exempt from attachment and execution.⁴

A claimant likewise must seek his relief by a review of the judgment entered against him and will not be permitted to make a collateral attack upon the proceedings.⁵ It is a long established doctrine that where a court has had jurisdiction of the parties and the subject-matter, its decisions, whether correct or otherwise, will, until reversed, be regarded as binding in every court.⁶

1. *Parks v. Adams*, 113 N. Car. 473, 18 S. E. Rep. 665.

2. *Cahoon v. Ellis*, 18 Vt. 500; *Emerson v. Bradley*, 18 Vt. 586; *Towne v. Leach*, 32 Vt. 747.

3. *Gatchell v. Foster*, 94 Ala. 622, 10 So. Rep. 434; *Openheim v. Pittsburgh, etc., R. Co.*, 85 Ind. 471; *Houston v.*

Walcott, 1 Iowa 86; *Wilson v. Burney*, 8 Neb. 39.

4. *Union Pac. R. Co. v. Smersh*, 22 Neb. 751.

5. *Fisher v. Williams*, 56 Vt. 586.

6. *Freeman v. Howe*, 24 How. 450; *Peck v. Jenness*, 7 How. 612.

CHAPTER XXXIV.

GARNISHEE'S PROTECTION FROM OTHER SUITS.

- § 707. Judgment of a court having jurisdiction protects the garnishee.
- 708. Judgment on a void garnishment is no protection to the garnishee.
- 709. Judgment sometimes equivalent to payment.
- 710. Payment in good faith on a judgment not void protects the garnishee.
- 711. Same—Payment must be compulsory, not voluntary.
- 712. Same—Payment into court protects garnishee when done by order of court.
- 713. Payment in good faith on voidable judgment protects garnishee.
- 714. Payment no protection when debt evidenced by negotiable note in circulation.
- 715. Judgment before notice of assignment protects garnishee.
- 716. Judgment after notice of assignment is no protection.
- 717. Judgment no protection to an acceptor of a draft or order.
- § 718. Judgment no defense when exemption not claimed.
- 719. Judgment no protection when rights of others not shown.
- 720. Judgment no protection when entered upon a willful default.
- 721. Extent to which pending suit protects the garnishee.
- 722. Judgment in another state is a protection.
- 723. Judgment no protection unless an execution may be issued.
- 724. Judgment not conclusive of amount of indebtedness to defendant.
- 725. Judgment discharging garnishee no defense to suit by defendant.
- 726. Judgment protects garnishee from further liability at suit of the plaintiff.
- 727. Judgment no protection against a suit by other persons—Exception.

§ 707. Judgment of a court having jurisdiction protects the garnishee.—A judgment rendered in a garnishment proceeding by a court having jurisdiction both of the subject-matter and of the parties, is a protection to the garnishee who has made a full and complete disclosure of the facts touching his liability, and has thereafter been adjudged to pay to the plaintiff the

amount found to be due from such garnishee to the defendant. Any payment made by the garnishee upon an execution issued upon a judgment of a court of competent jurisdiction charging him therewith will protect him from any subsequent suit brought against him by the principal defendant on the same indebtedness that he was adjudged to pay. If he has so paid all the funds in his hands belonging to such principal defendant, he will be discharged from all further liability to him. The courts hold universally in maintaining that a garnishee can not be compelled to pay his debt twice.¹

To be availed of the judgment in garnishment against him as a defense to an action of debt thereafter brought against him by the principal defendant, the garnishee must, however, allege and show that the judgment in garnishment was for a part or the whole of the same debt on which the action was brought.² The extent to which the judgment in garnishment rendered against the garnishee is a protection to him, is measured by the amount of the judgment rendered in garnishment against him; that is to say, the judgment rendered against him will discharge his liability to the defendant to the extent that such judgment is deemed to be a payment of his indebtedness to such principal defendant.³ The satisfaction of the judgment against the garnishee is a payment *pro tanto* of his

1. Brannon v. Noble, 8 Ga. 549; Robertson v. Roberts, 1 A. K. Marsh. (Ky.) 247; Richardson v. Hickman, 22 Ind. 244; Harmon v. Birchard, 8 Blackf. (Ind.) 418; Wheeler v. Aldrich, 13 Gray (Mass.) 51; Morrison v. New Bedford Institution for Savings, 7 Gray (Mass.) 269. See Schoppenhast v. Bollman, 21 Ind. 280.

The fact that the court has omitted to charge him upon giving judgment against the principal defendant will not affect the right of the garnishee to show the garnishment in defense of an action thereafter brought against him to recover the same property or debt. Howe v. Tefit, 15 R. I. 477.

2. Cornwell v. Hungate, 1 Ind. 156; Smith v. Moore, 1 Smith (Ind.) 154, 1 Ind. 228; Harmon v. Birchard, 8 Blackf. (Ind.) 418.

3. Hall v. Daniel, 62 Ga. 620; Canaday v. Detrick, 63 Ind. 485; Shetler v. Thomas, 16 Ind. 223; Schoppenhast v. Bollman, 21 Ind. 280; Norris v. Hall, 18 Me. 332; Mitchell v. Greenwald, 43 Miss. 167.

This will include costs when they are taxed against him to be paid out of the fund which he holds in excess of what is necessary to satisfy the plaintiff's demand.

indebtedness to the person who was made the principal defendant in the garnishment proceeding.¹

§ 708. **Judgment on a void garnishment is no protection to the garnishee.**—No valid judgment can be entered against a garnishee until a valid judgment is first entered against the principal defendant.² Therefore, a judgment against the garnishee entered upon a judgment against the principal defendant which is void, will be no protection to the garnishee when he is thereafter sought to be held liable on his indebtedness to the principal defendant.³ The payment of a judgment entered against a garnishee, rendered in a garnishment proceeding in aid of an execution, will be no protection in a suit brought by the defendant or his assignee where the process so sued out before execution on the prior judgment was returned “no property found.”⁴ Judgment rendered against a garnishee by a justice who never had jurisdiction of the principal case, notwithstanding the fact he had entered judgment therein, will be no protection to the garnishee, paying the same, as against a suit thereafter brought by the principal defendant or his assignee.⁵ Likewise the payment of a judgment rendered against a garnishee in an original attachment proceeding will be no defense to him thereafter, where such proceeding was commenced after the death of the principal defendant. There can be no valid attachment in such case.⁶

1. *Desha v. Baker*, 3 Ark. 509; *Canaday v. Detrick*, 63 Ind. 485; *Wood v. Mann*, 125 Mass. 319.

2. *Ante*, § 681.

3. *Dearborn Laundry Co. v. Chicago & A. R. Co.*, 55 Ill. App. 438; *Loring v. Folger*, 7 Gray (Mass.) 505; *Laidlaw v. Morrow*, 44 Mich. 547; *Ford v. Hurd*, 4 Smedes & M. (Miss.) 683; *Whitcomb v. Atkins*, 40 Neb. 549, 59 N. W. Rep. 86; *Waddle v. Cureton*, 2 Spears (S. Car.) 53.

4. *Whitcomb v. Atkins*, (Neb.) 59 N. W. Rep. 86; *Dearborn Laundry*

Co. v. Chicago & A. R. Co., 55 Ill. App. 438.

A return made by direction of the judgment creditor's attorney is not sufficient. *Dunderdale v. Westinghouse Electric, etc., Co.*, 51 Ill. App. 407. Nor is a paper purporting to be an execution from a justice's court, when the same is not signed by the justice. *Dearborn Laundry Co. v. Chicago & A. R. Co.*, 55 Ill. App. 438.

5. *Laidlaw v. Morrow*, 44 Mich. 547.

6. *Loring v. Folger*, 7 Gray (Mass.) 505.

§ 709. **Judgment sometimes equivalent to payment.**—It has been sometimes held that a valid judgment rendered against a garnishee is equivalent to the payment of the demand of the garnishee's creditor¹ to the amount due upon the judgment,² and that the same will constitute a good defense for the garnishee in a subsequent action brought against him by his principal upon the same demand, without proof on the part of the garnishee that such judgment has been satisfied.³ But the better rule is that while the judgment may be pleaded in defense to such an action, in order that he may not be required to pay the same debt twice, yet the fact that such a judgment has been entered is not a complete defense, unless the same has been satisfied.⁴ The judgment itself does not extinguish the garnishee's debt to the principal defendant;⁵ but the judgment does extinguish his debt to the extent of the sums accounted for by him as applied toward the satisfaction of such judgment.⁶

It has been reasonably held, in one case, that where a judgment has been entered against the garnishee, and he is thereafter again made a garnishee in a suit brought by his creditor on the same demand that was garnished, he is entitled to have the garnishment plaintiff made a party to the suit and to have such judgment entered against him as will protect him from being twice compelled to pay the same debt.⁷

§ 710. **Payment in good faith on a judgment not void protects garnishee.**—It is a rule of universal application that a garnishee who has in good faith made payment of his indebtedness to the principal defendant, when required so to do by judgment entered in a garnishment proceeding, which judg-

1. Coburn *v.* Currens, 1 Bush (Ky.) 242.

2. Norris *v.* Hall, 18 Me. 332.

3. M'Allister *v.* Brooks, 22 Me. 80; Sessions *v.* Stevens, 1 Fla. 233. But no judgment will be a defense unless an execution may issue upon it. *Post*, § 723.

4. Cook *v.* Field, 3 Ala. 53; Flower

v. Parker, 3 Mason 247; Wise *v.* Hilton, 4 Me. (4 Greenl.) 435; Farmer *v.* Simpson, 6 Tex. 303.

5. Brown *v.* Somerville, 8 Md. 444.

6. Dole *v.* Boutwell, 1 Allen (Mass.) 286.

7. Westmoreland *v.* Miller, 8 Tex. 168.

ment is not absolutely void, will protect such garnishee from any further liability in regard to such indebtedness.¹ This rule has been sustained, although the garnishee had given his note for the payment of the indebtedness to a person assuming to act for another, upon the agreement that the note was to remain in the hands of a third person until the creditor's concurrence was obtained, after which a judgment was entered in garnishment against the maker, and he satisfied the same before suit was brought upon the note by the holder.² The rule was also applied where a garnishee gave his note to the attaching creditor for the amount of the effects in his hands, upon the condition indorsed thereon that the same should be given to the absconding debtor, if the latter should recover in a certain suit then pending against the garnishee. The note having been procured from the garnishee upon threats of *scire facias* proceedings against him, it was held to be a sufficient payment of the judgment to protect him.³

The payment, in good faith, of a judgment which is erroneous because of having been rendered by a justice for an amount greater than was actually due, will relieve the garnishee to that extent from further liability to the principal defendant in the suit, or to his assignee.⁴

§ 711. Same—Payment must be compulsory, not voluntary. —The garnishee, to be protected in the payment of a judgment entered against him in a garnishment proceeding, must only make such payment when he is legally compelled so to do. He will not be protected in making a voluntary payment, or in making payment because of the mistaken belief that he will be compelled so to do. Making payment upon a judgment *nisi*, where no *scire facias* or other proceeding has been had to

1. *Smoot v. Eslava*, 23 Ala. 659; *Duncan v. Ware*, 5 Stew. & Por. (Ala.) 119; *Cook v. Field*, 3 Ala. 53; *Mills v. Stewart*, 12 Ala. 90; *McClure v. Litchfield*, 11 Ala. 337; *Cutler v. Baker*, 2 Day (Conn.) 498; *Platen v. Byck*, 50 Ga. 245.

2. *McClure v. Litchfield*, 11 Ala. 337.

3. *Cutler v. Baker*, 2 Day (Conn.)

498.
4. *Cottle v. American Screw Co.*, 13 R. I. 627.

render such default judgment final, can not be by him shown in bar of a recovery thereafter sought against him by the principal defendant, or his assignee, on the same demand.¹ A garnishee who had answered stating that he owed a certain amount on a note, but that the same has been assigned, and who then pays the same to the garnishment plaintiff without further proceedings being had, will not thereby be protected from a subsequent liability at the suit of the owners of the note. His payment being voluntary, he is not protected.²

Likewise a garnishee who fails to object, because the judgment entered against him was greater than the amounts due to his creditor, can not thereafter set up the excess in defense to a suit brought by his creditor upon an indebtedness thereafter accrued. He was not compelled to pay the excess.³

For the same reason a garnishee will not be protected in the payment of any sum to the garnishment plaintiff before judgment is rendered in the garnishment proceeding. He is not required so to do nor is any officer or other person authorized to make a demand upon him for the payment of any sum, although admitted by him in his answer to be due, until final judgment is rendered against him in the garnishment proceedings.⁴ The fact that the plaintiff's attorney, by representing that the proceedings have been compromised and dismissed, thereby inducing the garnishee to surrender to him the property which the garnishee has admitted to be in his possession belonging to the principal defendant, will not protect the garnishee from his liability to a subsequent garnishing creditor, whose proceedings were based upon the original suit which had not been dismissed, although the garnishee had no actual notice of such creditor's garnishment.⁵ The fact that the garnishee's clerk has surrendered the property which is the subject of the garnishment, before final judgment is entered, can not be relied

1. *Johns v. Field*, 5 Ala. 484; *Union Bank v. Hanish*, 97 Mich. 404, 56 N. W. Rep. 768; *ante*, § 683.

2. *Button v. Trader*, 75 Mich. 295, 42 N. W. Rep. 834.

3. *Chicago, W. & V. Coal Co. v. Balmer*, 45 Ill. App. 59.

4. *Mason v. Crabtree*, 71 Ala. 479.

5. *Ryan v. Burkam*, 42 Ind. 507.

upon by the garnishee in bar of a suit thereafter brought against him to recover such property.¹

§ 712. **Same—Payment into court protects garnishee when done by order of the court.**—Inasmuch as under some statutes the garnishee may, by the order of the court, be directed to pay therein the amount which he, by his answer, has admitted to be due to the principal defendant, the garnishee, in complying with such order, properly entered, thereby discharges himself from liability to the principal defendant or his assignee upon the same demand; and should the garnishment be thereafter dismissed, he may nevertheless set up the fact of such payment in bar of a suit thereafter brought by either the principal defendant or his assignee upon the same demand. The fund so paid in compliance with the order of the court is in custody of law and the garnishee so making payment can not be forced to pay a second time.²

§ 713. **Payment in good faith on voidable judgment protects garnishee.**—Courts universally hold that a judgment entered by a court having jurisdiction of the subject-matter and the parties, even though voidable, is binding until reversed. The payment of such a judgment discharges a garnishee to that amount from further liability to the principal defendant, although the judgment may have been so far irregular that it would be reversible on error or appeal. Furthermore, the fact that such a judgment is reversed, after satisfaction by the garnishee of the judgment entered against him, will not invalidate the payment. When the payment be made

1. *Farrell v. Pearson*, 26 Ill. 463.

If the defendant, upon the plaintiff's promise to save him harmless, pay to such plaintiff the amount due to the principal defendant and the garnishee be thereafter discharged, the plaintiff is liable to the garnishee for the amount paid by the garnishee to him, and if the defendant sues the garnishee, the latter is not bound to permit

the plaintiff to undertake the defense without giving security for costs; but such garnishee may pay the principal defendant the amount of the debt and costs accrued, and then recover the same in an action against the plaintiff in garnishment. *Broadhurst v. Morgan*, (N. H.) 29 Atl. Rep. 553.

2. *Mattingly v. Boyd*, 20 How. (U. S.) 128.

in good faith, the garnishee will be protected from a second payment.¹ A judgment which would be voidable on appeal, is a protection to the garnishee until the same is avoided by direct proceedings. Furthermore, he can not himself object to the error in it when he has taken no steps to have it set aside on that account.²

The payment of a judgment against a garnishee will protect him, although the proceedings between the debtor and creditor have been irregular and are reversible.³ The garnishee is unaffected by such proceedings and disinterested in them when the principal defendant is personally before the court, but he must always, for his own protection, know that the court has jurisdiction to enter judgment against him. If the principal defendant is not personally before the court, a judgment entered against him without jurisdiction will not protect the garnishee when his creditor, the principal defendant, thereafter demands payment of the amount to him.⁴

The rule stated negatively is applied with equal force, and a garnishee who makes a false disclosure and pays the debt in bad faith will not be protected thereby from liability thereafter to his actual creditor. And, further, the plaintiff in such a case will hold the same as money paid to the creditor's use, and

1. *Parmer v. Ballard*, 3 Stew. (Ala.) 326; *Oppenheim v. Pittsburgh*, Cincinnati, etc., Ry. Co., 85 Ind. 471; Ohio, etc., Ry. Co. v. *Alvey*, 43 Ind. 180; *Richardson v. Hickman*, 22 Ind. 244; *Houston v. Walcott*, 1 Iowa 86; *Webster v. Lowell*, 2 Allen (Mass.) 123; *Howard v. McLaughlin*, 98 Pa. St. 440; *Telles v. Lynde*, (Dist. Ct.) 47 Fed. Rep. 912.

The judgment entered in a police court, although irregular and erroneous, will protect the garnishee in the payment thereof, although he takes no appeal from such erroneous judgment. *Webster v. Lowell*, 2 Allen (Mass.) 123.

Where a fisherman's wages were

garnished upon a debt justly due, and the vessel owner as garnishee was compelled to make payment thereof after having resisted in good faith, he can not thereafter be made to pay the amount to the fisherman, even though the proceedings before the justice are reversible on error. *Telles v. Lynde*, (Dist. Ct.) 47 Fed. R. 912.

2. *Houston v. Walcott*, 1 Iowa 86.

3. Ohio, etc., Ry. Co. v. *Alvey*, 43 Ind. 180.

4. *Louisville, N. A. & C. Ry. Co. v. Lake*, 5 Ind. App. 450, 32 N. E. Rep. 590; *Baltimore, Ohio, etc., R. R. Co. v. Taylor*, 81 Ind. 24; *Richardson v. Hickman*, 22 Ind. 244; *ante*, § 660.

the creditor will be entitled to the same on demand, or to an action therefor.¹

§ 714. **Payment no protection when debt evidenced by negotiable note in circulation.**—As before stated, the garnishee, in his answer, should disclose the *facts* in relation to his liability to the principal defendant,² and if such liability is evidenced by a negotiable instrument not due, it is uncertain that the indebtedness is owing to the principal defendant. It having been the duty of the garnishee to show the negotiable character of the instrument, and more especially to show that the same has been transferred, if he know of it, or if demand has been made upon him by the assignee, he will not be protected in the payment of a judgment entered against him, because of his having failed to state such facts. A negotiable instrument, even though transferred after the service of garnishment process upon the maker, will entitle the *bona fide* holder to recover the amount against such maker, the garnishee.³ A garnishee who disclosed the existence of a promissory note due in ten days after presentment, and who paid the amount thereof, on being charged by judgment in garnishment without insisting that the plaintiff should prove that the note which was negotiable still remained in the absent principal defendant's hands, was not thereby protected when a suit was thereafter brought against him by the payee of the note.⁴ It is the policy of the law to give the garnishee an opportunity to protect himself by compelling the production of the note or a showing that a sale or transfer has been made, if such is the fact.⁵

1. First Nat. Bank v. Mellen, 45 Mich. 413.

2. *Ante*, §§ 622-623.

3. Kimbrough v. Davis, 34 Ala. 583; Brannon v. Noble, 8 Ga. 549; Brittain v. Anderson, 8 Baxter (Tenn.) 316; Myers v. Beeman, 9 Ired. (N. Car.) 116; *ante*, §§ 564-573.

4. Ormond v. Moye, 11 Ired. (N. Car.) L. 564.

5. Murphy v. Wilson, 45 Mo. 427; *ante*, §§ 671-673.

In Texas when a judgment has been rendered against the garnishee, and he is thereafter sued by the payee of the note, the practice requires that the plaintiff in garnishment should be a defendant in the suit on the note, and the collection of the judgment in garnishment enjoined until the court may ascertain to whom the debt is really due. Dobbin v. Wybrants, 3 Tex. 457.

It has sometimes been held that a garnishee, who is the maker of a promissory note not due at the time of the garnishment, will be protected by the payment of a judgment entered against him, if he has no knowledge of its transfer, although an action may thereafter be brought against him upon the note by a *bona fide* holder, for value, before maturity. This is on the principle that the law only requires that a garnishee shall, in good faith, see that the money is recovered from him in due course of law.¹ But this is contrary to the principles of the law merchant and the rule is not generally applied except as to past due paper and instruments transferable only by assignment, in which cases the taker is charged with the knowledge of the equities existing against it, among which are the rights of the plaintiff in garnishment.² Furthermore, there is no need that courts should hold in conflict with the rules of the law merchant, because, if the garnishee show the uncertainty of his liability to the principal defendant, no judgment can be entered against him in favor of the garnishment plaintiff.³ In such a case then the plaintiff may produce evidence fixing the liability of the garnishee to a certainty by showing that the garnishee does in fact owe the fund to the principal defendant, which is represented by the promissory note;⁴ and that the same is due and payable; or, if owing, may have his cause continued until the same is payable.⁵

§ 715. Judgment before notice of assignment protects garnishee.—Since it is necessary in all cases where the indebtedness of the garnishee is evidenced by an instrument in writing, transferable only by assignment, that the garnishee should have notice of such assignment before judgment was rendered against him in order to make such assignment effective against a garnishee,⁶ it logically follows that the payment by the garnishee, of a judgment rendered against him, will

1. *Shetler v. Thomas*, 16 Ind. 223;
Anderson v. Young, 21 Pa. St. 443.

2. *Ante*, §§ 538, 541; *ante*, §§ 563, 564,
 569.

3. *Ante*, §§ 643 and 481.

4. *Ante*, § 651, *et seq.*

5. *Ante*, § 690.

6. *Ante*, §§ 539, 540 and 563.

protect him in an action thereafter brought by an assignee where the garnishee did not know of the assignment at the time of the rendition of judgment against him.¹ The judgment against the garnishee in such a case is *prima facie* a bar to a subsequent recovery on the same instrument in the hands of any one. The law in such cases constitutes the execution creditor an assignee of the note and entitles him to the payment of the same in the same manner as though the instrument had been regularly assigned to him by the act of the defendant. Were it not so "there would be the strange and extraordinary anomaly in a tribunal of justice committing an act of injustice by compelling a party to pay twice on the same engagement."²

Furthermore, where the judgment was rendered against the garnishee before he had knowledge of the assignment, the fact that he has paid the same after having received notice of the assignment does not in any manner lessen the right to complete the payment of the judgment in garnishment in bar of the subsequent suit by the assignee.³

Notwithstanding the fact, however, that the averment in the garnishee's answer of an assignment of the instrument should be a good defense to a recovery against him by the plaintiff in garnishment, yet the fact that such a defense has been interposed without success will constitute no defense to an action thereafter brought by the assignee of the instrument.⁴

§ 716. **Judgment without notice of assignment is no protection.**—It being the duty of the garnishee to bring to the attention of the court the fact of the assignment of the instrument on which the suit is brought, no matter at what time he learns the same, if before judgment is rendered,⁵ the payment

1. *Newman v. Manning*, 79 Ind. 218; *Iowa* 535; *Matthews v. Houghton*, 11 Me. (2 Fairf.) 377; *Wentworth v. Nelson*, 8 Blackf. (Ind.) 265; *Cornwell v. Hungate*, 1 Ind. 156; *Rooker v. Daniels*, 5 Ind. 519; *Shetler v. Thomas*, 16 Ind. 223; *Schoppenhast v. Bollman*, 21 Ind. 280; *Richardson v. Hickman*, 22 Ind. 244; *McGuire v. Pitts*, 42

2. *Sessions v. Stevens*, 1 Fla. 233.

3. *Newman v. Manning*, 79 Ind. 218.

4. *Gates v. Kerby*, 13 Mo. 157.

5. *Ante*, § 628.

of a judgment rendered after he has notice of the assignment will be no protection to him from liability to the assignee of the instrument in a suit thereafter brought. The garnishee should have resisted the garnishment proceeding by disclosing the assignment in his answer, or by filing an amended answer showing the fact and requiring that the claimant should be brought in as an interpleader.¹ If the garnishee makes but a partial disclosure so that the court has no opportunity to judge of the real merits of the case, or the garnishee fail to have the assignee brought in as an interpleader, where the same may be done, and there be any indication of collusion between the garnishee and the plaintiff in garnishment, a judgment entered therein will furnish the garnishee no protection whatever.² His payment of such a judgment would not be in good faith as required by the rule.³

§ 717. **Judgment no protection to an acceptor of a draft or order.**—It is a well known rule of law, not only applying to bills of exchange but to all drafts and orders, whether negotiable or otherwise, and whether written or oral, that an order or direction to pay a certain fund to a third person becomes an absolute assignment of that fund to such third person upon such order or direction being accepted by the holder of the fund. If, therefore, one who is made a garnishee in a garnishment proceeding have theretofore accepted an oral or written order to pay such fund to another than the original debtor, he can not properly be held liable for the payment of the same to the plaintiff in a garnishment proceeding in an action against the principal defendant, the assignor. The garnishee may neglect his duty to disclose the effect of the assignment in his answer,⁴ and thereby cause a judgment to be entered against him in favor of the plaintiff, but the payment of such judgment will

1. *Colvin v. Rich*, 3 Porter (Ala.) 175; *Foster v. White*, 9 Porter (Ala.) 221; *Covert v. Nelson*, 8 Blackf. (Ind.) 265; *Large v. Moore*, 17 Iowa 258; *Field v. McKinney*, 60 Miss. 763; *Lewis v. Dunlop*, 57 Miss. 130; *Weil v. Tyler*, 38 Mo. 558.

2. *Bibb v. Tomberlin*, 1 Duv. (Ky.) 186; *Seward v. Heflin*, 20 Vt. 144.

3. *Ante*, § 713.

4. *Ante*, § 628.

not relieve him from liability to payment again of the same demand to the assignee of the fund. By accepting the order he became absolutely indebted to the assignee of the fund, and permitting himself to be held liable thereafter by judgment in garnishment, and making voluntary payment thereof, will not relieve him from such obligation.¹

§ 718. **Judgment no defense when exemption not claimed.**—It being the duty of the garnishee to claim all legal exemptions for the principal defendant when the latter is not personally in court to claim for himself the exemptions from attachment to which he is entitled to by law,² a garnishee, who, knowing the exempt character of the garnished fund or property in his hands, and who fails to disclose that fact to the court in his answer, will not thereafter be protected from his further liability to the principal defendant, when the latter brings suit to recover such fund or property.³ Knowing that a fund is exempt from attachment, and failing to claim the exemption, is bad faith,⁴ as is also an evasive answer.⁵ And a garnishee, satisfying a judgment entered thereon, will act at his peril. However, a garnishee acting in good faith and failing to claim an exemption as of wages, not knowing the same to be exempt, and satisfying the judgment, which is thereupon rendered against him, will thereafter be protected against any further claim urged by the principal defendant.⁶

§ 719. **Judgment no protection when rights of others not shown.**—The garnishee is under obligation to show in his answer not only that the fund has been assigned or is exempt, but must disclose all facts relative to the interest of strangers to the suit, whether the same be existing liens,⁷ equities under

1. *Montague v. Myers*, 11 Heisk. (Tenn.) 539.

2. *Ante*, § 629.

3. *Smith v. Dickson*, 58 Iowa 444; *Work v. Brown*, 38 Neb. 498, 56 N. W. Rep. 1082; *Turner v. Sioux City & Pacific R. R. Co.*, 19 Neb. 241.

4. *Smith v. Dickson*, 58 Iowa 444.

5. *Work v. Brown*, 38 Neb. 498, 56 N. W. Rep. 1082.

6. *Turner v. Sioux City & Pacific R. Co.*, 19 Neb. 241.

7. *Ante*, § 627.

special contract,¹ or any other interest whatever; after which such claimants may interplead as parties and have their rights adjudicated.² A garnishee had in his possession chattels to be sold for the benefit of the holder of a mortgage thereon. He was made a garnishee in a suit against the owner and paid the fund without disclosing in his answer the facts of the case as they existed. He was not thereafter permitted to set up such payment in defense of an action against him brought by the holders to recover the proceeds of the property.³ A garnishee who showed by his answer that his indebtedness to the principal defendant was not to him individually, but to him as guardian, without further resisting the force of the process, was not thereafter permitted to set up such payment in defense of an action brought by a true owner of the fund.⁴ The payment was not compulsory.⁵

The garnishee will, however, be protected in the payment of a judgment, which, though rendered against a fund ordinarily exempt from attachment and execution, was nevertheless rendered for necessities; as where he was in possession of a fund belonging to a minor and the principal defendant (the guardian) was held liable in a prior suit for the board of his ward, who was the owner of the fund.⁶

§ 720. Judgment no protection when entered upon a willful default.—The garnishee is required, by the writ served upon him, to make answer as directed, touching his liability to the principal defendant named therein, and notwithstanding the fact that he is merely a stakeholder indifferent to both parties, it is his duty to make a full disclosure of the facts in the case that the legal rights of both may be preserved. Therefore, if he makes willful default in not interposing an answer as required by the writ, he neglects his duty to both the plaintiff and the defendant, and will not be relieved from liability by the satisfaction of a judgment rendered against him on such

1. *Ante*, § 644.

2. *Ante*, §§ 671-677.

3. *Smith v. Ainscow*, 11 Neb. 476.

4. *Horton v. Grant*, 56 Miss. 404.

5. *Ante*, § 711.

6. *Woods v. Milford, etc., Savings Inst.*, 58 N. H. 184.

default. If he have notice of an assignment of the fund and judgment is rendered against him in default of answer, he may nevertheless be held liable upon the same demand when urged by the assignee.¹

§ 721. **Extent to which pending suit protects the garnishee.**—A distinction is noticeable between suits begun before garnishment and suits begun subsequent to garnishment. Actions begun upon the debt prior to the garnishment are more apt to be fatal to the proceeding, because the court having acquired jurisdiction in them first, they will naturally be shown in defense to the garnishment and have been hereinbefore considered when treating of defenses to garnishment proceedings.²

There are three general doctrines regarding the liability of a garnishee in a suit against him upon the same demand for which he is garnished. One class of cases holds that the pendency of a prior suit by the principal defendant may be shown by the garnishee in bar of the garnishment proceeding.³ But a much larger class maintains that the pendency of a garnishment is not matter to be pleaded in bar, but that the same may be shown in abatement only because payment alone, or discharge of the liability, is the only proper matter to be pleaded in bar, and that before garnishment can be pleaded in bar judgment entered, and execution issued thereon, making the liability absolute, must be shown.⁴

Still other cases on two sound principles of law: (1) that the property and effects of a debtor should be applied to the payment of his creditors, and (2) that a plaintiff should not be

1. *Wardle v. Briggs*, 131 Mass. 518; *Whipple v. Robbins*, 97 Mass. 107.

2. *Ante*, § 660.

3. *Noble v. Merrill*, 48 Me. 140; *Baltimore, etc., R. Co. v. May*, 25 Ohio St. 347.

4. *Crawford v. Clute*, 7 Ala. 157; *Phleger v. Ivins*, 5 Harr. (Del.) 118; *Clise v. Freborne*, 27 Iowa 280; *Brown v. Somerville*, 8 Md. 444; *Grosslight v. Crisup*, 58 Mich. 532; *Near v. Mit-*

chell, 23 Mich. 382; *Yazoo & M.V. R. Co. v. Fulton*, 71 Miss. 385, 14 So. Rep. 271; *Nevins v. Rockingham Mut. Fire Ins. Co.*, 25 N.H. (5 Fost.) 22; *Coates v. Roberts*, 4 Rawle (Pa.) 100; *Irvine v. Lumbermen's Bank*, 2 Watts & S. (Pa.) 190; *Lowry v. Lumbermen's Bank*, 2 Watts & S. (Pa.) 210; *McRee v. Brown*, 45 Tex. 503; *Cheongwo v. Jones*, 3 Wash. Cir. Ct. 359.

thrown out of court because the same demand is sought to be applied to the satisfaction of another pretended debt which has not yet been legally determined, recommend the practice of continuing the one case until the garnishment proceeding is determined and then rendering judgment as may best protect the several parties; or if the cause is not continued, that execution on the judgment entered be stayed until the judgment plaintiff can procure the judgment defendant to be released from the garnishment.¹ To sustain this position one court says: "We think it furnishes an occasion, a most fitting occasion, for modeling the judgment so as to stay the execution for a proper amount of the debt so long as is necessary for the garnishee's protection."²

When a subsequent suit is brought against the garnishee upon the debt by a person other than the principal defendant in the garnishment, the fact of the pendency of the garnishment proceeding is not proper subject-matter for a common law plea. The common law did not contemplate such a contingency, but provided for the pleading of pending suits between the same parties. Attachment is unknown to the common law. However, the fact remains that the garnishee should not be held liable to two payments of the same demand, and one court maintains that the proper course is to set up the fact of the pendency of the garnishment in an affidavit and move for a stay of proceedings until the garnishment process shall have been determined.³

When one suit is pending against the garnishee another garnishment proceeding against him must of necessity be stayed until there is a determination of the first garnishment, because one court having acquired jurisdiction another court can not obtain it while the matters remain undetermined in the first court.⁴ This rule is also applied when one garnish-

1. Crawford v. Clute, 7 Ala. 157; Crawford v. Slade, 9 Ala. 887; McDonald v. Carney, 8 Kans. 20; Shealy v. Toole, 56 Ga. 210; Yazoo & M. V. R. Co. v. Fulton, 71 Miss. 385 14 So. Rep. 271; Jones v. Wood, 30 Vt. 268.

2. Shealy v. Toole, 56 Ga. 210.

3. McKeon v. McDermott, 22 Cal.

667.

4. Brickey v. Davis, 9 Ill. App. 362.

ment proceeding is pending in one state and a subsequent garnishment proceeding is begun in another state. Any judgment which may be rendered against him in the latter state must be subject to the condition that no execution be taken out under it until the garnishee's liability under the proceedings in the other state are ascertained.¹

§ 722. **Judgment in another state is a protection.**—No rule of law is better established than that a judgment entered by a court having jurisdiction of both of the parties and the subject-matter will be binding until the same is reversed or overruled. This rule is followed to the extent that the judgments of the courts of one state, procured according to its laws in an action previously begun, and often against one who is a non-resident thereof, will be respected by the courts of another state. A judgment, even in a foreign attachment, is conclusive as to all matters of right and title to property within its jurisdiction decided by such court. Consequently where one has been held as a garnishee in one state and has there satisfied, in full or in part, the judgment rendered, he will be protected from a second liability for the same in a suit brought in another state, when the facts of the foreign judgment are properly brought to the attention of the court.²

This rule is adhered to to the extent that an employer, held liable in garnishment in one state, will not generally be again held liable in another state, although the wages garnished are exempt from garnishment by the laws of the latter state.³ The

1. *Broadnax v. Thomason*, 1 La. Spring, 11 Serg. & R. (Pa.) 188; Ann. 382. *Stearns v. Wrisley*, 30 Vt. 661.

2. *Barrow v. West*, 23 Pick. (Mass.) 270; *Gunn v. Howell*, 35 Ala. 144; *Allen v. Watt*, 79 Ill. 284; *Taylor v. Phelps*, 1 Har. & G. (Md.) 492; *Baxley v. Linah*, 16 Pa. St. 241; *Whipple v. Robbins*, 97 Mass. 107; *Meriam v. Rundlett*, 13 Pick. (Mass.) 511; *Cochran v. Fitch*, 1 Sand. Ch. (N. Y.) 142; *Moore v. Spackman*, 12 Serg. & R. (Pa.) 287; *Updegraff v.* The judgment must of necessity be valid, *Loring v. Folger*, 7 Gray (Mass.) 505; *ante*, § 707, and not void, *ante*, § 708, and must have been satisfied under compulsion and not voluntarily paid. *Stearns v. Wrisley*, 30 Vt. 661; *ante*, § 711.

3. *Gray v. Delaware and Hudson Canal Co.*, 5 Abb. (N. Y.) N. Cas. 131.

exemption laws affect the remedy and are therefore usually applied according to the laws of the state in which the action is brought.¹

On the principle, however, that the courts of one state can only bind the persons and property within its territorial jurisdiction, some courts, sustained by English authority, have held contrary to what is now the accepted doctrine of the American courts as above stated, and maintain that a judgment in one state without personal notice to, or personal summons or appearance of, the defendant has no extra-territorial validity and will not be binding in any other state.² For the protection of laborers and their families it is still sometimes held that a garnishee held liable in one state for wages exempt in both states, when the principal defendant is not personally in court, will not, in such latter state, be protected from a subsequent recovery thereof by the principal defendant.³ These holdings are also upon the principle that the garnishee is only protected when he discloses the exempt character of the fund as he is by the law required to do.⁴

Furthermore, the satisfaction of a foreign attachment to be a protection to the garnishee must have been entered upon a full and fair disclosure; otherwise it would not be either compulsory,⁵ or in good faith.⁶ And, therefore, if such judgment was rendered against the garnishee upon his denial of a fact which, if disclosed, would have prevented him from being charged by the laws of that state, the satisfaction of that judgment will afford no protection from a subsequent demand for the same fund when urged by the non-resident principal defendant or his assignee.⁷

1. *Ante*, § 629.

2. *Moore v. Gennett*, 2 Tenn. Chy. 375.

3. *Terre Haute and I. R. Co. v.*

Baker, 122 Ind. 433, 24 N. E. Rep. 83;

Terre Haute and I. R. Co. v. Baker,

4 Ind. App. 66, 30 N. E. Rep. 431;

ante, § 629.

4. *Ante*, §§ 718 and 629.

5. *Ante*, § 711.

6. *Ante*, § 712.

7. *Wilkinson v. Hall*, 6 Gray (Mass.) 568.

§ 723. **Judgment no protection unless an execution may be issued.**—No judgment is a protection to a garnishee against further liability, unless such judgment will compel him to pay the indebtedness; because if this were not so he would be entirely relieved from the payment of his debt. Therefore, even though some courts may hold a valid judgment equivalent to payment in the sense that it may be pleaded in defense in a further action,¹ yet no court will hold an unpaid judgment a defense to the garnishee in a subsequent action unless execution may issue upon such judgment. Consequently although the prior judgment may have been perfectly valid, yet if the plaintiff have neglected to have his execution issued until the time therefor has expired and the time within which a *scire facias* may be sued out to renew the judgment has also expired, the garnishee may be held liable in a subsequent action brought to recover the same demand; because he is no longer liable in the first judgment in garnishment.²

Proof of satisfaction of judgment.—An execution returned satisfied fully discharges the judgment entered in the cause. Therefore, if the garnishee is thereafter sued by the principal defendant or his assignee on the same demand, or if a garnishment is sued out on a judgment so satisfied, the production of the execution satisfied will be sufficient to quash the pending suit or proceeding.³

§ 724. **Judgment not conclusive of amount of indebtedness to defendant.**—A judgment, especially when satisfied, may be conclusive between the garnishee and the principal defendant to the extent of such judgment, as in the preceding sections shown, but it is an equally well established principle that the judgment is not conclusive of the amount that was due from the garnishee to the principal defendant. The judgment is not *res adjudicata* between the garnishee and the principal de-

1. *Ante*, § 709.

2. *Burnap v. Campbell*, 6 Gray (Mass.) 241; *Fuller v. Rice*, 4 Gray (Mass.) 343; *Flower v. Parker*, 3 Mason (U. S.) 247.

Regarding the expiration of the time in which *scire facias* may be sued out to *revive* the judgment, see *Fuller v. Rice*, 4 Gray (Mass.) 343.

3. *Thompson v. Wallace*, 3 Ala. 132.

fendant to such an extent as to preclude the principal defendant from thereafter showing that a greater amount is due than was admitted by the garnishee in the attachment proceeding. It has been determined that so much was due as the garnishee has admitted, but the question of further liability has not been decided, for the question has not been raised requiring such determination, and the judgment in garnishment is only *res adjudicata* to that extent. If it were otherwise it would be within the power of the garnishee to relieve himself from liability to his creditor by admitting a smaller amount of indebtedness than he did in fact owe.¹

Not conclusive of off-set.—On the same principle a judgment regarding the set-off, which is claimed by the garnishee, is not *res adjudicata* between him and the principal defendant, but his right thereto may thereafter be questioned in a subsequent suit brought by the defendant or his assignee.²

§ 725. **Judgment discharging garnishee, no defense to suit by defendant.**—On the principle last above stated that the judgment entered in a garnishment suit is not *res adjudicata* between the garnishee and the principal defendant, except as to the amount admitted by the garnishee and determined by the court to be due, a judgment *discharging* the garnishee may not be shown by him as a fact in defense to an action thereafter brought against him by such principal defendant or his assignee on the same demand. Such judgment is only decisive of the garnishment plaintiff's right to require payment of the garnishee, and the defendant or his assignee may thereafter proceed in an action at law against the person that was proceeded against in garnishment, in the same manner, and to the same effect, as though no such garnishment proceedings had ever been instituted.³

1. *Cameron v. Stollenwerck*, 6 Ala. 704; *Barton v. Allbright*, 29 Ind. 489; *Robeson v. Carpenter*, 7 Martin (La.) N. S. 30; *Groves v. Brown*, 11 Mass. 334; *Brown v. Dudley*, 33 N. H. 511; *Puffer v. Graves*, 26 N. H. 256; *Drew v. Towle*, 27 N. H. 412; *Tams v. Bullitt*, 35 Pa. 308; *Breading v. Siegworth*, 29 Pa. St. 396; *Ruff v. Ruff*, 85 Pa. St. 333; *Baxter v. Vincent*, 6 Vt. 614.

2. *Smith v. Stearns*, 19 Pick. (Mass.) 20.

3. *Webster v. Adams*, 58 Me. 317;

§ 726. **Judgment protects garnishee from further liability at suit of the plaintiff.**—On the principle that the judgment in garnishment is *res adjudicata* between the garnishee and the plaintiff, the latter can not thereafter maintain an action on the case against the garnishee for having obtained his discharge by making false and fraudulent representation in his answer, and by fraudulent collusion between himself and the principal defendant.¹

§ 727. **Judgment no protection against a suit by other persons—Exception.**—It is a self-evident proposition that no judgment is *res adjudicata* as to matters which have not been adjudicated. The rights of no person are *res adjudicata* unless such person has been a party to the proceedings legally determined by the court. Therefore where property or effects have been attached in the possession of the garnishee, as the property of the principal defendant, a judgment rendered to that effect will not be conclusive against a person who claims adversely to such principal defendant and who has not been made a party to the suit. If the indebtedness was not to the principal defendant, judgment against the garnishee will not bind his actual creditors.² They may thereafter bring suit against him, or their creditors may bring garnishment against the garnishee.³ On this principle, if one is a garnishee in two suits and by agreement with the first garnishing creditor a defendant pays the debt before the cause has proceeded to judgment, there will be no adjudication of the rights of the parties, and the second garnishing creditor, who was not a party to the arrangement, may proceed to judgment, provided his writ is served prior to the settlement.⁴ If the writ was not served prior to such a settlement there will be no indebtedness from the garnishee to the principal defendant at the time of the service, as required by the rule.⁵

Puffer v. Graves, 26 N. H. 256; Ruff 530, 53 N. W. Rep. 900; Adams v. v. Ruff, 85 Pa. St. 333. Filer, 7 Wis. 306.

1. Lyford v. Demerritt, 32 N. H. 234. 3. Breeding v. Siegworth, 29 Pa. St.

2. First Nat. Bank v. Mellen, 45 396.

Mich. 413; Wilson v. Groelle, 83 Wis. 4. Wilder v. Weatherhead, 32 Vt. 765.

5. Ante, § 476.

The principle above stated is applicable where a garnishee is held liable on a joint note or other joint indebtedness, in a suit against one of the joint owners. The judgment of the court thereon is not *res adjudicata* as to the owner not made a party to the suit.¹

Exceptions.—It seems that not only an assignee of past-due paper, who is by the law merchant chargeable with a notice of all the equities existing against the instrument,² but that an indorsee of a negotiable instrument not due, who has actual notice of the pending garnishment at the time he takes the instrument, takes it subject to the rights of the attaching creditor, and that if judgment is rendered in the latter's favor in the garnishment, and the garnishee satisfy the same, he may thereafter plead such judgment in bar of an action brought against him by the indorsee of the note.³ The rule above stated likewise has no application where the third person claiming an interest in the property or effects garnished has interposed an interpleader;⁴ or where the disclosed claimant has been compulsorily brought in, or adjudged in default, where he has not filed an interpleader in the case, in states where the claimant can be compelled to interplead or be adjudged in default for a failure so to do. In this case the third person, having been made a party to the proceeding, has had his day in court, and the matters determined will be *res adjudicata* as to him.

1. *Hirth v. Pfeifle*, 42 Mich. 31.

2. *Ante*, § 564, *et seq.*

3. *Glanton v. Griggs*, 5 Ga. 424.

4. *Ante*, § 671.

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